STATE OF MICHIGAN
IN THE SUPREME COURT

JONES FAMILY TRUST,
Plaintiff/Appellant,

and

SYLVIA JONES, and
BOBBY JONES
Plaintiffs,

v.

SAGINAW COUNTY LAND BANK AUTHORITY and ROHDE BROS. EXCAVATING, INC.,
Defendants/Appellees

and

CITY OF SAGINAW, and HARDHAT DOE, an unknown employee
Defendants
_____/

Supreme Court Case No.: _____
Court of Appeals Case No.: 329442
Circuit Court Case No.: 13-019698-NZ-2
Honorable Robert L. Kaczmarek

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APPELLANT JONES FAMILY TRUST'S
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STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain this *Application for Leave to Appeal* pursuant to MCR 7.305(C)(2)(a). The Michigan Court of Appeals had jurisdiction to entertain and adjudicate this appeal of right pursuant to MCR 7.202(6)(a)(i) and MCR 7.203(A)(1) as the *Order of Judgment* issued by the Saginaw County Circuit Court, Judge Robert L. Kaczmarek presiding, on September 22, 2015 constitutes a final order/judgment. Copies of the final decision and the Court of Appeals' decision are attached hereto.

STATEMENT OF QUESTIONS PRESENTED

I. Does a 'destructive forces' inverse condemnation claim under *Peterman v Dep't of Natural Resources*, 446 Mich 177 (1994) continue to exist under Michigan law?

Appellant answer: Yes.

II. Did the Court of Appeals error in holding the negligence-based damages rule provided by *Price v High Pointe Oil* applies to breach of third-party contract claims in contravention of this Court's well-established rule that contract damages is a jury question requiring a determination of what would place the injured party in as good a position as it would have been in had the promised performance been rendered?

Appellant answer: No.

III. Is depreciation an element of damages that must be proved by the plaintiff or is it an affirmative defense to be raised by a defendant?

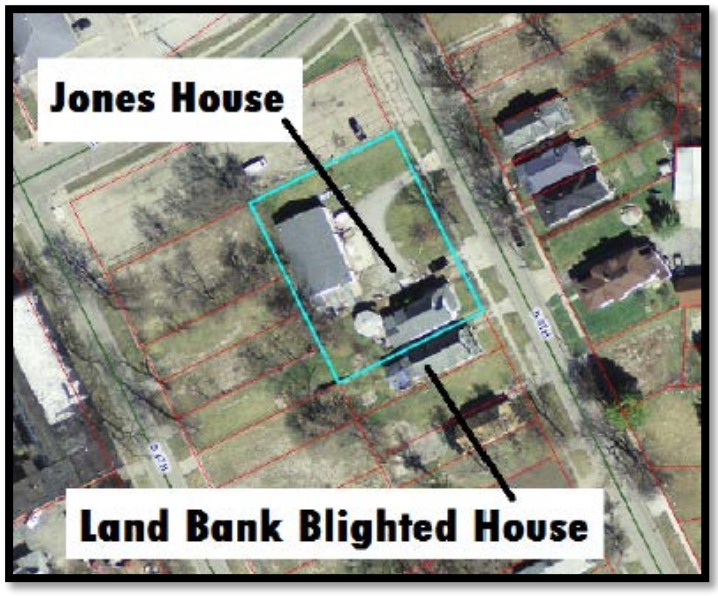
Appellant answer: Depreciation is an affirmative defense to be raised by the defendant.

INTRODUCTION

The facts of this case are extremely simple. On the morning of September 18, 2012, a demolition crew was knocking down a blighted house in Saginaw, Michigan owned and controlled by the Saginaw County Land Bank Authority ("Land Bank"). Suddenly, the roof on the Land Bank's blighted house broke away uncontrollably, crossed the property line, and collided with the neighboring house owned by the Jones Family Trust ("Trust"). We need not speculate what happened, because there is surveillance video of the strike (which is in the court record). Defendant Rohde Bros. Excavating, Inc. ("Rohde Bros") conceded below it breached its third-party contract with the Jones Family Trust. See ***Order of Judgment*.** However, the trial judge limited damages to a fraction of the actual losses and wrongfully released the Land Bank from its constitutional liability. The Court of Appeals affirmed in relevant part. Leave is sought to correct the incorrect legal standards imposed by affirmance by the Court of Appeals.

FACTS

This case involves two neighboring houses, one owned by the Saginaw County Land Bank Authority (being 343 S. 5th Ave, **Exhibit A)**, and the other by the Jones Family Trust (being 339 S. 5th Ave), in the City of Saginaw on their neighboring city lots. The Jones House is the long-time home of Bobby and Sylvia Jones, and their various foster-later-adopted children. **Sylvia Jones**



Dep, pp. 13, 17-18.[1] The Jones House (and the property it rests upon) are titled to a trust known as the Jones Family Trust, the appellant. ***Id.*****, at 6.** This property and home has been in Bobby Jones's family for generations.

Next door to the Jones House is a long-time eyesore, a blighted and long-abandoned structure at 343 S. 5th Ave. After the previous, abandoning owners stopped paying taxes, this house (the "Blighted House") and its property were forfeited to local taxing authorities and ultimately came to be owned by the Saginaw County Land Bank Authority, a governmental entity created pursuant to the LAND BANK FAST TRACK ACT, Public Act 258 of 2003. See **Exhibit A**. The Land Bank did not revitalize or improve the Blighted House. The Land Bank's Blighted House was a direct and ongoing violation of the City of Saginaw's DANGEROUS BUILDINGS ORDINANCE. The Land Bank acknowledged the Blighted House was a dangerous building and actively decided not to revitalize or improve its property. Rather than complying with the local ordinance's safety requirements, the Land Bank partnered with the City of Saginaw to allow the City's private-party demolition contractors to tear down the Blighted House. This demolition was paid by grants (Neighborhood Stabilization Funds) obtained from the federal government. **Exhibit B**. After a competitive bidding process among various local private excavating companies, the City awarded the demolition contract to Rohde Bros as the lowest-priced qualified bidder to raze the Land Bank's Blighted House.[2] **Exhibit C.** There were key provisions within this contract contractually accepted by Rohde Bros,

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[1] *Defendants, City of Saginaw, Rohde Bros. Excavating Inc's Brief in Support of Motion for Summary Disposition*, Exhibit 4. For ease of reference, this deposition transcript will be referred to as "Sylvia Jones Dep, p. __" and is attached hereto.

[2] The illegal house was owned, controlled, and under the legal responsibility of the Land Bank.

which become important later *infra*. The demolition on the Blighted House started on the crisp morning of September 18, 2012. Answer to First Amended Compl, ¶16; **Exhibit F.**

On the fateful morning of September 18, 2012, crews from Rohde Bros, on behalf of the Land Bank, commenced the process of beginning to demolish the Blighted House. Shortly after beginning, the workers lost control of a large portion of the Blighted House and its roof at approximately 8:06 a.m., which then crossed over and slammed into the side of the Jones House. **Exhibits D and G**.[3] The strike was captured, in decent part, on video. ***Id*.** At the time of the strike, Sylvia Jones was across the street and watched, in horror, as a large section of the Blighted House slammed into her home where her husband, Bobby, and at least one child was having breakfast. Fortunately, no one was hurt or killed; the Jones House, however, suffered a massive systemic blow. **Exhibit H**. The occupants of the Jones House (being Bobby and Sylvia Jones and their children) were forced to abandon personal property (damaged) and also flee the damaged Jones House by moving to a smaller nearby house also owned by the Trust, which in turn caused lost rental profits in the form of the Trust being precluded from renting this other property to renters, as previously done. Bobby and Sylvia Jones lost out on their quiet enjoyment of their property in their golden years. Later, after utilities bills were skyrocketing from wasted fuel from the damaged heating systems caused by the strike, Sylvia had the utilities shut off to prevent unnecessary waste and to "winterize" the home.[4] **Sylvia Jones Dep, pp. 86-87**.

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[3] **Exhibits D and G** are videos which were sent on CD to the Clerk of the Court of Appeals due to inability for TrueFiling to accept the same, and are part of the record.

[4] Because these defendants refused to fix their caused damage, additional foreseeable damage occurred when the Jones House was further damaged by the frost heave caused by the natural cycle of Michigan's seasons. That theory was accepted by the trial court and the Court of Appeals.

For this case, plaintiffs retained two structural experts[5]—both former building officials from Berrien County—who inspected the Jones House and offered their analysis. The first was Walter "Barney" Martlew, a registered and licensed professional engineer and former building inspector for the City of Benton Harbor. **Martlew Dep, p. 6.** Martlew serves on the board of directors of Kalamazoo Area Building Authority, which provides direction and oversight for residential and commercial inspections for various governmental entities in Kalamazoo County. ***Id*., pp. 6-7.** The second was Sam Hudson, a licensed residential builder. **Hudson Dep, p. 5.** Both experts contributed testimony explaining the damage to the Jones House was caused by the strike from the run-away Blighted House. **Exhibit H.** Of particular importance, Hudson found "[e]xtensive upgrades [were] required to make the structure code compliant" and "make the total cost of repairs *impractical to consider*." **Exhibit H, p. 6.** These experts concluded the Jones House "certainly suffered significant damage" which "are directly attributable to the strike incident." ***Id*., at 4.**

In May 2013, the Trust, together with Bobby and Sylvia Jones, filed suit against the Land Bank, the City, Rohde Bros, and an unknown employee named Hard Hat Doe as defendants. See Compl. Discovery was undertaken. For reasons unimportant to this appeal, the City and Hard Hat Doe were voluntarily dismissed from the legal action, leaving just the Land Bank and Rohde Bros. Neither remaining defendant admitted responsibility.

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[5] A third expert was retained and deposed for trial purposes. The third expert, a builder, provided the cost to rebuild the Jones House. Rebuilding a similarly sized home was cost just under $300,000 to construct. Rebuilding was selected as the reasonable method of proving damages because the total cost of *repairs* was impractical to consider. **Exhibit H, p. 6.**

While various claims were asserted with various theories, only a small portion are relevant by this appeal. First, Plaintiffs alleged that the Land Bank, as a governmental entity, was responsible via a constitutional theory of inverse condemnation pursuant to Article X, Section 2 of the Michigan Constitution, together with the Fifth and Fourteenth Amendments (made enforceable pursuant to 42 USC § 1983).[6] As for Rohde Bros, the Trust alleged general negligence, trespass, and breach of third-party contract under the bid agreement between the Land Bank/City of Saginaw and Rohde Bros. **Exhibit C**, **p. 4.**

At the end of discovery, the Land Bank moved for summary disposition on the inverse condemnation claims. The Circuit Court summed up the argument precisely:

> Defendant Land Bank argues that this Court should summarily dismiss Plaintiffs' federal claim for an unconstitutional taking under the Fifth and Fourteenth Amendments of the U.S. Constitution is warranted because it did not carry out or administer the demolition project, did not specifically direct any action toward Plaintiffs' property to limit its use, there is no causal connection between its alleged actions and the damages alleged, and the nuisance exception to the Fifth Amendment's taking clause excuses it from payment of just compensation.

OPINION AND ORDER OF THE COURT, dated Sept 29, 2014, p. 3. Plaintiffs opposed. For the reasons discussed below, the Court granted (albeit erroneously) the Land Bank's motion for summary disposition. *Id.*, p. 14.

As to Rohde Bros, it attempted to defend on all sorts of grounds—nearly all of which were unsuccessful.[7] **OPINION AND ORDER OF THE COURT, dated Sept 29, 2014, p.**

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[6] Plaintiffs also sought attorney fees and costs pursuant to 42 USC § 1988.

[7] Defendant Rohde Bros appealed, twice, the Circuit Court's decision to allow the case to go to trial. First, Rohde Bros, a private company, argued it had government immunity and took an appeal by right. The Court of Appeals immediately dismissed the appeal finding a corporate entity cannot reasonably be considered a governmental party, agency, official, or employee, and thus no appeal by right for denial of governmental immunity. *Jones Family Trust v Saginaw Co Land Bank Auth'y*, unpublished order of the Court of Appeals, issued Oct 24, 2014 (Docket No. 324106). Undaunted, Rohde

19. The Circuit Court set trial for the claims of trespass, negligence, and breach of third-party contract. See **Register of Actions**. As to the third-party breach of contract, Plaintiffs' theory was that under terms of demolition contract (as agreed to by Rohde Bros for the demolition of the Blighted House), there contained an express promise to a specified class of third-parties: the abutting properties.

BUILDING DEMOLITION

The buildings shall be completely demolished. All products of demolition shall be disposed of in a landfill or proper recycling area. Evidence of proper disposal shall be provided to the City of Saginaw with disposal tickets. The contractor shall take care to protect abutting properties, pedestrians, motorists, and existing improvements which are not to be removed (ie. City Side Walks). It is understood that heavy equipment is used in the demolition of these structures and this heavy equipment must be transported across existing City sidewalks and that damage may occur as a result. If damage occurs and the contractor can demonstrate that all precautions were taken to prevent damage to the sidewalks contractor may submit an invoice for the replacement of up to 16 lineal feet of City sidewalks, damages exceeding 16 lineal feet in length shall be the responsibility of the contractor. Photos of damaged City sidewalks are required per HUD regulations prior to replacement. Building demolition costs shall be determine by the cost per cubic foot of volume of each building. This shall include all enclosed living spaces, attics and covered porches. Photos of damaged City sidewalks are required per HUD regulations prior to replacement.

Exhibit C, p. 4. It is undisputed that the Jones House is an abutting property to the home being demolished, which Rohde Bros promised, by contract, that it "shall take care to protect" the same. The Court agreed and allowed this claim to go to the *Jones* jury. **OPINION AND ORDER OF THE COURT, dated Sept 29, 2014, p. 16.**

On the eve of trial, there remained three plaintiffs and a single defendant, Rohde Bros. As the remaining defendant, Rohde Bros filed a multi-part *Motion in Limine* just before trial. Despite no direct argument on the issue of damage limitations, the Circuit Court issued another *Opinion and Order* at 4:50p.m. on the day before trial. The Circuit Court discussed the Supreme Court's decision of *Price v High Pointe Oil Co, Inc*, 493

Bros filed a delayed application for leave to appeal, which was also denied. *Jones Family Trust v Saginaw Co Land Bank Auth'y*, unpublished order of the Court of Appeals, issued May 12, 2015 (Docket No. 324792).

Mich 238; 828 NW2d 660 (2013) reaffirming the common law "*O'Donnell* rule" "as the measure of damages to property applicable to ***negligence*** claims in Michigan."

> If injury to property caused by negligence is permanent or irreparable, [the] measure of damages is [the] difference in its market value before and after said injury, but if [the] injury is reparable, and [the] expense of making repairs is less than [the] value of [the] property, [the] measure of damages is [the] cost of making repairs.

However, the Circuit Court then pulled a surprise, which is the main basis of the appellate challenge—the Circuit Court applied the ***negligence*** limitation to the pending ***third-party breach of contract*** claim—

> Finally, with respect to the breach of contract claim, the Court observes the gravamen of the claim sounds in tort notwithstanding its label. As intended third-party beneficiaries, Plaintiffs have no expectancy under the contract other than that they receive the benefit the contracting parties intended for such third-parties receive. In this case, that benefit simply involves a promise by Rohde Bros. to "take care" in the performance of their contractual undertaking for the benefit and protection of certain classes of reasonably identifiable third-persons and property while undertaking its performance of the contract for demolition services. The contract provides, in pertinent part:
>
> The contractor shall take care to protect abutting properties, pedestrians, motorists, and existing improvements which are not to be removed (i.e. City Side Walks).
>
> *Defendants, City of Saginaw, Rohde Bros. Excavating, Inc's Brief in Support of Motion for Summary Disposition., Ex. 3, 4 (underlined emphasis added).*
>
> This language identifies no additional duty that is not already imposed by operation of the common law. In other words, even absent this specific contractual promise to exercise care to protect abutting properties and other third parties while performing the contract, Rohde Bros. was already under a duty to do precisely that under common law tort principles.
>
> Michigan law recognizes that a contracting party is subject to a "preexisting common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings. That duty, which is imposed by law, is separate and distinct from defendant's contractual obligations ..." *Loweke v. Ann Arbor Ceiling & Partition Co., L.L.C.*, 489 Mich. 157, 172[; 809 NW2d 553] (2011). See also *Courtright v. Design Irr, Inc.*, 210 Mich.App. 528, 530, 534 N.W.2d 181, 181-183 (1995)("While performing a

> contract, a party owes a separate, general duty to perform with due care so as not to injure another. Breach of this duty may give rise to tort liability. *Clark v. Dalman*, 379 Mich. 251, 261, 150 N.W.2d 755 (1967). The duty to act with due care encompasses the duty to prevent injury from a peril created during performance.").
>
> Consequently, with respect to the breach of contract claim, there is no contractual expectancy possessed by the third-party Plaintiffs under the relevant provision beyond the expectation that the common law duty of ordinary care would be followed - it is nothing more than a promise not to act negligently. As Michigan law instructs that the *O'Donnell* rule is to be applied as the measure the damages for the negligent injury to real property resulting from a party's failure to exercise ordinary care, it again provides the measure of damages even when the cause is pled in the form of a breach of contract action.
>
> Therefore, in light of the foregoing, **the Court determines the appropriate measure of damages to the House in this case, regardless of the theory pled to support recovery of those damages, is the cost of repair only if the injury is reparable and the expense of repair is less than the market value of the property; otherwise, the measure of damages is the difference in the value of the property before and after the injury**.

OPINION AND ORDER OF THE COURT, dated August 31, 2015 (copy attached). In other words, the Circuit Court applied the law of negligence to a claim of breach of third-party contract. This conclusion, especially the highlighted portion, is contrary to this Court's precedence.

On the morning of the trial, the parties met in chambers to discuss the case and the aftermath of the Circuit Court's 11th hour faxed decision. Plaintiffs had previously submitted jury instructions weeks before seeking to apply different instructions regarding damages for the *Jones* jury for each separate claim/theory proffered—the *Price* rule for negligence and the *Alan Custom Homes*[8] rule for the breach of third-party contract. But with the Circuit Court's ruling as the law of the case, the most the jury could award was up to the *Price* negligence limitation. Plaintiffs' primary claim was the

[8] 256 Mich App 505; 667 NW2d 379 (2003).

breach of third-party contract, which was to be argued to the jury as far in excess of the negligence-based damages. To that end and with the *Price* limitation imposed, Rohde Bros conceded it breached of third-party contract claim and then stipulated to entry of a judgment ceding liability on the breach of third-party contract. However, the Court specifically ordered that—

> Plaintiff, Jones Family Trust, will be appealing to the Michigan Court of Appeals to challenge the damages limitation decreed by the *Opinion and Order of the Court*, dated August 31, 2015 [and the] Court finds that this issue is specifically preserved for appellate purposes.

See **ORDER OF JUDGMENT, Sept 22, 2015, p. 2**. Judgment was entered in favor of Plaintiff Jones Family Trust against Rohde Bros in the amount of $20,000.00 in light of the *Price* limitation, and an appeal to the Court of Appeals followed.

At the Court of Appeals, the panel issued an opinion that failed to accept of the Trust's legal arguments. *Jones Family Trust v Saginaw Co Land Bank Auth'y*, unpublished decision of the Court of Appeals, issued April 20, 2017 (Docket No. 329442). First, the *Jones* panel held the *Peterman* claim was not viable because an "allegedly negligent act committed by the government actor, during the demolition, led to the damage." *Id*., at *5. While *Peterman* makes no such distinction, the Court of Appeals wrongly believed it did and "prevents the application of *Peterman* and *Estate Dev Co*[9] in the case at bar." *Id*. Similar to the jetties in *Peterman*, the panel explained that had "the demolition of the home caused erosion to the Trust's property in the months after the demolition, *Peterman* and *Estate Dev Co* would arguably be controlling." *Id*.

[9] *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished decision of the Court of Appeals, issued Mar 24, 2011 (Docket No. 291989)

As to the issue of limitation damages, the panel found that the Trust "may be theoretically correct" in that the *Price/O'Donnell* standard, a tort standard, does not apply to the breach of third-party contract claim because the contract damages standard is different, i.e. to be placed in as good as a position as it would have been had the contract not been breached." *Id*., at *6. Yet, the panel ultimately framed the ***contractual*** promise of Rohde Brothers to "take care" as nothing more than the contracting for a duty "analogous" to the common-law [tort] duty to act with care and thus damages are limited by *Price/O'Donnell*. *Id*.

Lastly, as to the depreciation issue, the panel did not undertake any substantive analysis, but rather tersely concluded "we are unable to find any authority to support the Trust's ultimate position." *Id*. Instead, the panel looked to a pre-1990 case and concluded that "depreciation constitutes part of what a plaintiff must demonstrate in proving his or her damages with reasonable certainty, not something that a defendant must prove as an affirmative defense." *Id*., at *7. Yet, the element of depreciation appears nowhere in the Model Civil Jury Instructions.

With these legal errors made by the Court of Appeals and the Circuit Court, this *Application for Leave* now follows.

STANDARD OF REVIEW

This Court has discretion to grant leave to hear this *Application.* MCR 7.305(C)(2)(a). The interpretation and application of law is a question of law reviewed de novo. *Cardinal Mooney High Sch v Michigan High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Questions of law are reviewed de novo, *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014), as are grants of summary disposition, *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

ARGUMENT

I. The Court of Appeals erred in affirming the dismissal of the inverse condemnation claims under *Peterman*.

By this *Application*, the Court is requested to answer whether the 'destructive-forces' inverse condemnation claim under *Peterman v Dep't of Natural Resources*, 446 Mich 177 (1994) is as narrow as applied by the Court of Appeals. The Trust argues the Court of Appeals erred with the Trust having suffered compensated constitutional-based damages.

A. Michigan law directs that when damage occurs to private property, the government must pay just compensation as a form of inverse condemnation.

> The federal and state constitutions both proscribe the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000); *Oakland Co Bd of Co Rd Comm'rs v JBD Rochester, LLC*, 271 Mich App 113, 114; 718 NW2d 845 (2006). The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 543; 481 NW2d 762 (1992).

Heydon v MediaOne of Southeast Michigan, Inc, 275 Mich App 267, 279-280; 739 NW2d 373 (2007). A governmental entity's actions can be a taking of private property even though the public agency never directly exercised control over the property, provided that some action by the government constitutes a disturbance of or interference with property rights. *In re Acquisition of Land-Virginia Park,* 121 Mich App 153, 159; 328 NW2d 602 (1982). "Where private property has been ***damaged*** rather than ***taken*** by governmental actions, the owner may be able to recover therefor by way of an inverse or reverse condemnation action." *Virginia Park*, *supra*, at 158 (emphasis added). "An inverse condemnation suit is one instituted by an owner of land whose property, while not having been formally taken for public use, has been damaged by a

public improvement undertaking or other public activity." *Id*. (emphasis added). Governmental action falling short of actual physical occupancy, acquisition, or appropriation still constitutes a taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter." *Id*. at 160 (citations omitted).

To establish an inverse condemnation claim in such a case, an injured party must prove only two things: (1) that the government's actions were a substantial cause of the decline of the plaintiff's property, and (2) that the government abused its legitimate powers through affirmative actions directly aimed at the plaintiff's property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 549; 688 NW2d 550 (2004); *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004).

The Trust asserted a 'destructive-forces' inverse condemnation claim. This Court has held that a compensable taking is established "where [the government] set into motion the destructive forces that caused the damage to plaintiff's property." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994); see also *Estate Dev Co v Oakland County Rd Comm'n,* unpublished opinion of the Court of Appeals, issued Nov 20, 2007 (Docket No. 273383).[10] *Peterman*[11] has explained that "*any* injury to the property of an individual w*hich deprives the owner of the ordinary use of it is equivalent to a taking*, and entitles him to compensation." *Peterman, supra* at 190 (emphasis added). Unlike the approach taken by the Court of Appeals' *Jones* panel,

[10] There are two unpublished Court of Appeals cases deriving from the same underlying case, *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished decision of the Court of Appeals, issued Nov 20, 2007 (Docket No. 273383)(*Estate Dev Co I*) and *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished decision of the Court of Appeals, issued Mar 24, 2011 (Docket No. 291989)(*Estate Dev Co II*) that applied *Peterman*. This brief cited to *Estate Dev Co* when referring to these cases collectively.

[11] While this constitutional cause of action derives from *Peterman*, the name of this theory comes from *Estate Dev Co*.

"[t]he term 'taking' "should not be used in an unreasonable or narrow sense" and thus when a government action "set[s] into motion the destructive forces that caused the erosion and eventual destruction of the property," a compensable taking has occurred. *Id.*, at 189, 191. This claim does not require and makes irrelevant any physical taking or invasion by the government. *Id*., at 190 ("inverse condemnation may occur even without a physical taking of property"). In other words and stated succinctly, "where real estate is actually invaded by superinduced water, earth, sand, or *other materials* [query: a roof from a neighboring government-owned building?]… it is a taking within the meaning of the Constitution. *Id.*, at 184, 188-189 (emphasis added).

The *Peterman* Court explained the government's action in constructing a boat launch and installing jetties, which later resulted in the diminishment of the plaintiffs' neighboring riparian lands, was sufficient to establish a taking. *Peterman, supra*, at 200, 207-208. The government (by way of the DNR) set into motion the destructive forces that caused the later erosion and eventual destruction of the plaintiffs' neighboring property, even though the legitimate exercise of installation of water-based structures did not invade the plaintiffs' property or directly cause the resulting damage. *Id.* at 191. This Court rejected the government's argument that it need not compensate the damaged parties because its actions were within its legitimate power. *Id*. This Court also concluded that "simply because the state is acting [legitimately]… does not grant it the power to condemn all property without compensation." *Id.* at 198.

The Court of Appeals distinguished *Peterman* for *how* the damages occurred, rather than by what. It held that "[h]ad, for example, the demolition of the home caused erosion to the Trust's property in the months after the demolition, *Peterman* and *Estate*

Dev Co would arguably be controlling." The Court of Appeals confused the nature of a destructive forces claim as a constitutional claim solely premised on erosion. In other words, according to the Court of Appeals, a *Peterman* claim is only viable if the damage occurs after the physical 'work' of the government is complete and *later* erosion has occurred (whether installing jetties or demolishing a house). This is clearly in error. A *Peterman* claim is not about erosion; it is about creating constitutional liability when the government sets into motion (even if done legitimately) the destructive forces and a compensable taking occurs.

Since *Peterman*, there are only two decisions (from the same underlying case) which have dealt with a 'destructive forces' inverse condemnation claim under Michigan law after *Peterman.* In *Estate Dev Co*,[12] the basis for the taking claim is that the government agency, a road commission, engaged in affirmative acts in the exercise of its road construction activities that set into motion the destructive forces that later caused the flooding to plaintiff's property, while not directly invading plaintiff's land. The *Estate Dev Co* Court concluded that such a theory is appropriate for resolution by the jury. Subsequently, the jury returned a verdict in favor of plaintiff. On appeal, it also affirmed an instruction wherein plaintiff only had to prove that governmental entity "set into motion destructive forces" which caused damages. As result, the standard of *Peterman* was applied: plaintiff must only need to show that the government committed a particular affirmative act that set forces into motion, even though the act need not be

[12] While this constitutional cause of action derives from *Peterman*, the name of this theory comes from *Estate Dev Co*.

directly aimed at the property at issue, nor constitute an abuse of legitimate governmental powers. This is the standard the *Jones* panel should have applied.

Despite the clear standard in *Peterman* and *Estate Dev*, the Court of Appeals below implicitly and wrongly narrowed *Peterman* to claims only involving erosion. This is clearly in error. A *Peterman* claim creates constitutional liability beyond simple erosion; it creates constitutional liability when a government sets forces into action which later causes damages to another's property. That is what happened to the Jones House. The Land Bank, in keeping and attempting to remove its illegally blighted house, set into motion actions which proximately resulted in the Land Bank's subcontractors damaging and totaling[13] the Jones House. In short, the Land Bank's affirmative action of causing the demolition of its own dangerous and illegal house, and causing more than de minimis damage to neighboring private property constitutes an inverse condemnation under Michigan law, including *Peterman*. See also *Virginia Park*, *supra*, at 158 ("An inverse condemnation suit is one instituted by an owner of land whose property, while not having been formally taken for public use, has been damaged by a public improvement undertaking or other public activity."). Just as the DNR did in *Peterman* and the road commission did in *Estate Dev*, the Land Bank set into motion the destructive forces that ultimately, even if an indirect consequence, caused damage and/or the destruction of the Jones House, regardless of whether it was through the legitimate or illegitimate exercise of the Land Bank's governmental power. "The *Peterman* Court clearly indicated that an inverse condemnation action could be

[13] Plaintiff's expert, Sam Hudson, opined that the Jones House was totaled by the strike. *Defendants' Motion to Strike Plaintiffs' Alleged Experts Walter Martlew and Sam Hudson*, Exhibit 3 (Deposition of Hudson), pp. 37-38 (copy of transcript attached).

sustained even where damages were *an indirect consequence* of the government's actions and absent a direct invasion of property." *Estate Dev Co II, supra*, at *11 (emphasis added). But for the Land Bank's setting into motion the destructive forces by its later subcontractors to cause a large portion of the Land Bank's home to break away, leave the confines of the blighted property, and strike the Jones House, the Jones House would not have suffered loss—a loss that fully deprived the Trust, the owner, of the ordinary use of the Jones House. Such action, under Michigan case law, is or is the equivalent to a taking, and requires constitutional compensation. *Peterman, supra; Estate Dev, supra*. The Court of Appeals erred in allowing the wrongful dismissal of a proper and viable *Peterman* claim needing to be resolved by the *Jones* jury. Leave is requested to challenge and correct the lower panel's misapplication of the destructive forces constitutional claim as recognized by *Peterman*.

II. The Circuit Court erred applying the *O'Donnell* damages-limitation rule to the third-party breach of contract claim.

There is no dispute as to contours of the *Price/O'Donnell* rule—it applies to negligent destruction of property cases brought in this state. The question is whether the *Price/O'Donnell* rule applies *outside* the claim of negligent destruction of real property. The Court of Appeals erred in concluding it does, as this Court has already established a different applicable standard.

A. The Court of Appeals erred in preventing application of the contract damages standard on the breach of third-party contract claim and instead wrongly applied the damages standard as to negligent destruction of real property.

On the night before trial, the Circuit Court issued and faxed its decision limiting the scope of damages the Trust could seek under the breach of third-party contract—limiting it to the same damages as provided under the negligent destruction of real

property claim. The Trust's case was premised on seeking ***contract*** damages ***far*** in excess of the negligence claim damages.[14] It is undisputed: *Price v High Pointe Oil*[15] provides that "the appropriate measure of damages in cases ***involving the negligent destruction of property*** is simply the cost of replacement or repair of the property unless permanently irreparable then the measure of damages is the difference between its market value before and after the damage." *Id.*, at 240. This is known (and referenced by the trial court) as the *O'Donnell* rule. As such, it is and has been acknowledged throughout that any ***negligence*** claim against Rohde Bros is limited by the *O'Donnell* rule as reaffirmed by *Price v High Pointe Oil*. However, Trust separately pled a claim for breach of third-party contract with substantially greater claims of damages. "It is well settled that the appropriate measure of damages for breach of a contract is different than the *O'Donnell* rule. The contract damages standard is an award which "would place the injured party in as good a position as it would have been in had the promised performance been rendered." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989); see also *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 426; 751 NW2d 8 (2008)(same); *Corl v Huron Castings, Inc*, 450 Mich 620, 622 fn 7; 544 NW2d 278 (1996)(same); *Allen v Michigan Bell Telephone Co*, 61 Mich App 62; 232 NW2d 302 (1975)(same); *Ambassador Steel Co v Ewald Steel Co*, 33 Mich App 495; 190 NW2d 275 (1971)(same); *Dierickx v Vulcan Industries*, 10 Mich App 67; 158 NW2d 778 (1968)(same). The damages recoverable for breach of contract are those that arise naturally from the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667

[14] The imposition of the damages limitation precluded the presentation of the proposed case, as set and prepared to start about 15 hours from the issuance of the August 31st decision.

[15] 493 Mich 238; 828 NW 2d 660 (2013)

NW2d 379 (2003). The recovery of damages for breach of contract is very flexible, *Lawrence v Will Darrah & Assoc*, 445 Mich 1, 12 fn 12; 516 NW2d 43 (1994), and is a question for the jury as the finder of fact, *McManamom v Redford Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006)("Damages are an issue of fact, and questions of fact are, of course, generally decided by the trier of fact—in this case, the jury."). "When the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount." *Body Rustproofing, Inc v Mich Bell Tel Co*, 149 Mich App 385, 391; 385 NW2d 797 (1986).[16]

Here, the Trust simultaneously sought to pursue ***all*** available remedies (trespass, negligence, and breach of third-party contract) regardless of legal consistency, as long as not awarded a double recovery. *Jim-Bob, supra*, at 92 (a plaintiff may simultaneously pursue all of his remedies… regardless of legal consistency, so long as plaintiff is not awarded double recovery.). The Trust had separate claims with separate (but likely partially overlapping) measures of damage, with a negligence claim delineated by *Price* and a breach of contract claim delineated by *Jim-Bob* and *Alan Custom Homes*. Below, at the eve of trial, the Trust was prepared to argue that the measure of damages under the breach of third-party contract was the repair/rebuild cost of the Jones House following the strike—that which would place the Trust in as good a position as it would have been in had the promised performance been rendered. This damages argument

[16] This is the same measure of damages for a constitutional taking. *DOT v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999)("The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. *** There is no formula or artificial measure of damages applicable to all condemnation cases. **The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented**.").

for the jury's consideration was well in excess of the amount it could have obtained solely with a negligence claim under the *O'Donnell* damages limitation. See **Transcript, Sept 1, 2015, p. 9.** Expert Sam Hudson was prepared "to provide expert testimony to establish what would be needed to repair or replace the home," while Expert Thomas Bailey, a local expert, was prepared to testify as to the cost to rebuild which would be modern code compliant. Hudson would have opined that rebuilding, not repairing, was the only possible scenario given the damage to the Jones House. By the damages limitation placed upon breach of third-party contract claim, both experts were precluded from testifying as to the same.

On appeal, the Court of Appeals explained that the Trust "may be theoretically correct in this regard" but concluded that "the contract at issue seemingly imposed a duty analogous to the common-law duty to act with care." That is a great argument for a defendant to make *to the jury*, as damages remedies are both flexible and a question for jury. *McManamom, supra, at* 141; *Lawrence, supra,* at 12 fn12.

The Court of Appeals erred by recasting the claim as one sounding in tort and also usurping the role of the jury to decide what damages, if any, are the responsibility of Rohde Bros. This is becoming a common problem with the Court of Appeals—it is arbiter *of law*, not *of fact*. The decider of question of fact has always belonged to the finder of the fact—here, being the jury. The Court of Appeals erred in limiting the Trust's available damages under the breach of third-party contract claim (by affirming the

August 31, 2015 OPINION AND ORDER OF THE COURT) under the *O'Donnell* negligence law limitation.[17]

As such, the erroneous lower courts' decisions forced the parties into a paradigm whereby the Trust was handcuffed and would have been prevented from making the proper arguments and presenting the evidence of damages sought under the standards of ***contract*** law to the jury. Consequently, the parties agreed to an amount under the *O'Donnell* limitation after Rohde Bros conceded it breached the third-party contract with the Trust. See *Order of Judgment*. Given the error, this Court is requested to correct the error of law on damages, and, for purposes of this case, vacate the damages limitation rulings of the lower courts, remand with instructions to apply the correct damages standard to the breach of third-party contract claim, and allow the issue to be placed to the *Jones* jury for a damages-only trial.

III. Depreciation is an affirmative defense to be raised by a defendant.

As part of its August 31, 2015 order, the Circuit Court also explained, quoting *Strzelecki v Blaser's Lakeside Industries of Rice Lake, Inc*, 133 Mich App 191, 194-195; 348 NW2d 311 (1984), that—

> Clearly, replacement cost alone, without any deduction for depreciation, is not sufficient evidence of market value at the time of the loss. See *State Highway Comm'r v. Predmore*, 341 Mich. 639, 642, 68 N.W.2d 130 (1955); *Bluemlein v. Szepanski*, 101 Mich.App. 184, 192; 300 N.W.2d 493 (1980), lv. den. 411 Mich. 995 (1981). If replacement cost without depreciation was allowed, the plaintiff would recover an amount as if the property were new at the time it was destroyed. *Bluemlein, supra*.

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[17] This is not to say that Rohde Bros could not argue to the *Jones* jury that damages ***should*** be limited to the fair market value; however, this is a question of fact for the jury to decide, not precluded from the jury's consideration by the judge. *McManamom*, *supra*, at 141 (damages are a question for the jury to find a matter of fact, not of law).

The Circuit Court then precluded "the replacement cost (new) as inadmissible" under both MRE 402 and MRE 403 concluding that such evidence—

> has no tendency to show what the fair market value of the property was at the time of the injury and, even assuming some minimal relevancy could be articulated, its probative value would be substantially outweighed by the danger of unfair prejudice and misleading and/or confusing the jury on the issue of valuation of property.

OPINION AND ORDER OF THE COURT, dated August 31, 2015, p. 8. The Trust argued that depreciation is an affirmative defense, not a prima facie element to be proved by a plaintiff. The Court of Appeals did not ***directly*** analyze the issue.

Depreciation involves a reduction in the liability from what is owed and thus is an ***affirmative defense*** to the evidence of damages to be proffered by a plaintiff. An affirmative defense presumes liability but places the burden falls squarely onto the raising party to prove mitigating circumstances that would ***lower*** a damages award. *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994). When a defendant injures a plaintiff, the defendant takes plaintiff as he finds him. E.g. *Richman v City of Berkley*, 84 Mich App 258, 260-261; 269 NW2d 555 (1978). To the extent that defendants would seek to reduce their liability, i.e. seeking to impose depreciation, their arguments must be presented to the jury via a jury instruction by a raised affirmative defense.[18]

As such, the Court of Appeals erred in two ways: 1.) by not finding that depreciation is an affirmative defense; and 2.) concluding that depreciation is an

[18] Defendants did not raise the affirmative defense via its listed affirmative defenses and is thus waived. The failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense. *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). Additionally, the assertion of an affirmative defense must include the facts supporting the defense and the party asserting an affirmative defense has the burden of providing evidence to support the defense. MCR 2.111(F)(3); *AG ex rel DEQ v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007).

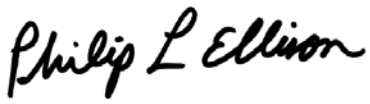
element of damages under a breach of third-party contract claim. The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented. See *VanElslander, supra.* No binding case law requires depreciation to be proven ***by a plaintiff*** as an element of damages. Whether depreciation should be applied is a question of fact as to the amount of damages—a question of fact for the *Jones* jury, not the trial court—as an affirmative defense to be affirmatively raised by the defendants and argued to the jury for their consideration. See *McManamom*, *supra*, at 141 ("Damages are an issue of fact, and questions of fact are, of course, generally decided by the trier of fact—in this case, the jury."). The Court of Appeals clearly errored.

RELIEF REQUESTED

WHEREFORE, the Court is requested to take action on this case, pursuant to MCR 7.305(H)(1), by peremptorily reversing the final judgment of the Circuit Court and correct Court of Appeals' legal errors regarding the Land Bank's constitutional liability and Rohde Bros' contractual damages, and remand for trial. Otherwise, the Court is requested to grant full leave on the issues presented. MCR 7.305(H)(1).

RESPECTFULLY SUBMITTED:

OUTSIDE LEGAL COUNSEL PLC



PHILIP L. ELLISON (P74117)
Attorney for Appellant Jones Family Trust

Date: June 1, 2017

Complete Report for SAGINAW (343 S 5TH AVE)

Printed: Apr 06, 2014

General Information

Property Information

Tax ID	06 0185 00000
Municipality	City of Saginaw
Street Address	343 S 5TH AVE SAGINAW, MI 48607
Last Assessor Update	4-3-2014

Ownership Information

Owner Name	SAGINAW COUNTY LAND BANK AUTHORITY
Owner Address	111 S MICHIGAN AVE SAGINAW, MI 48602

Photographs

Sorry, no photos were found.

Map

Assessments

Property Class:		401 - Residential	
School District:		Saginaw City (73-010)	
SEV for 2014:	0 - Tentative	**Taxable Value for 2014:**	$0.00 - Tentative
SEV for 2013:	0	**Taxable Value for 2013:**	$0.00
2013 Homestead Percentage:		0	

Sales History

Sale Date:	Sale	Grantor:	Grantee:	Instr:	Liber/Page

	Price:				
1996-03-13 00:00:00	$1	SYKES, MARY	DARDEN, ORALEE & TINSLEY, CARL R	OTH / PROBATE COURT ORDER	1963:0082
2011-03-31 00:00:00	$0	DARDEN, ORALEE & TINSLEY, CARL R	SAGINAW COUNTY TREASURER 11	OTH / FORECLOSURE	2624:2062
2011-12-06 00:00:00	$0	SAGINAW COUNTY TREASURER 11	SAGINAW COUNTY LAND BANK AUTH 11	QC / DEED BY CORPORATION	2646:1966

Residential Information

There are no recorded Residential Buildings on this Property

Residential Building Apex Sketch

There are no recorded Residential Buildings on this PropertyThere are no recorded Residential Buildings on this Property There are no recorded Agricultural Buildings on this Property

Agricultural Building Apex Sketch

Commercial & Industrial Information

Year Built:	Building Type:	Building Area:	# of Stories:

Commercial Building Apex Sketch

Land Information

Tax Description (For Tax Description Purposes Only)
1S.ELY.1/2 OF LOT 13,BLK.2, GLASBY,GALLAGHER AND LITTLES ADDITION

Lot Description	
Frontage:	33.067
Depth:	132.494
Acreage:	0
Zoning:	
Land Value:	264

Lot Apex Sketch

Real Property Tax Information

For more current balances for previous years, please contact the Saginaw County Treasurer's Office at (989) 790-5225.

2013 Summer Tax Bill

Payment Due: July 31, 2012

	Billed	Balance
Summer Taxes	0.00	0.00
Summer Interest & Penalty	0.00	0.00
Summer Special Assessments	0.00	0.00
Total Bill	0.00	0.00
Total Paid: 0.00		
Last Date Paid At Municipality:		

Tax Authority	Millage Rate	Billed
SUMMER ADMIN FEE		0

2013 Winter Tax Bill

Payment Due: February 14, 2012

	Billed	Balance
Winter Taxes	0.00	0.00
Winter Interest & Penalty	0.00	0.00
Winter Special Assessments	0.00	0.00
Total Bill	0.00	0.00
Total Paid: 0		

Tax Authority	Millage Rate	Billed
WINTER ADMIN FEE		0.00

For Previous Years Tax Information, please view the City of Saginaw's SONAR page for this Property.

MEMORANDUM OF UNDERSTANDING CONTRACT AMENDMENT BETWEEN THE CITY OF SAGINAW AND THE SAGINAW COUNTY LAND BANK AUTHORITY

THIS AMENDMENT entered into this 19th day of December, 2011, by and between the City of Saginaw, a Michigan municipal corporation, 1315 South Washington Avenue, Saginaw, Michigan 48601 (hereinafter referred to as "CITY") and the Saginaw County Land Bank Authority, 111 South Michigan Avenue, Saginaw, Michigan 48602, (hereinafter referred to as "LAND BANK AUTHORITY").

The parties mutually agree as follows:

WHEREAS, on September 26, 2011, the Saginaw City Council approved the Memorandum of Understanding ("MOU") between the CITY and LAND BANK AUTHORITY. The MOU set forth the responsibilities of the parties with regard to property acquisition and rehabilitation of Neighborhood Stabilization Program 2 ("NSP 2") properties;

WHEREAS, since the approval of the original MOU, there has been changes to some roles and/or responsibilities; and

WHEREAS, the Michigan State Housing Development Authority requested that the parties amend the MOU to include the additional responsibilities and the allocation of Program Income.

NOW THEREFORE, the parties hereto agree as follows:

1. Article 2 – Property Location, is amended to state the parties agree that all NSP 2 properties acquired for infill housing will be located in either the Cathedral District or Covenant District.

2. Article 4 – Property Rehabilitation, is amended to state the parties agree that the CITY is solely responsible for new construction and the rehabilitation of NSP 2 properties acquired by the LAND BANK AUTHORITY. The CITY'S responsibilities include, but are not limited to, hiring the contractors, overseeing construction and paying for the rehabilitation activities. The LAND BANK AUTHORITY will assist in paying for a portion of the new construction and rehabilitation activities. However, the CITY is responsible for administering the process.

3. Article 5 – Property Ownership, is amended to state the parties agree that the LAND BANK AUTHORITY will maintain ownership of all NSP 2 properties purchased for rehabilitation and/or new construction from the time of acquisition, during rehabilitation and at the time of closing. Ownership will transfer from the LAND BANK AUTHORITY to the new owner. However, the property located at 505 Millard is an exception and ownership has been transferred from the LAND BANK AUTHORITY to the CITY pursuant to a deed dated August 4, 2011.

4. Article 6 – Property Insurance, is amended to state that the parties agree that the LAND BANK AUTHORITY will maintain property insurance on all NSP 2 homes designated for rehabilitation and/or new construction, from the time of acquisition until the property is transferred to the new owner. Once the property is transferred to the new owner, it is the LAND BANK

EXHIBIT
B

AUTHORITY'S responsibility to contact the insurance company and cancel insurance coverage on the property.

5. Article 11 – Notices, is amended to state that all notices regarding this MOU must be sent to the following persons at the CITY and LAND BANK AUTHORITY:

CITY:	Director Department of Development 1315 S. Washington Ave. Saginaw, MI 48601 (989) 759-1542
SAGINAW COUNTY LAND: BANK AUTHORITY:	Chairperson Treasurer's Office 111 South Michigan Ave. Saginaw, MI 48602 (989) 790-5225

6. Article 12 – Liaison, is amended to state that the Director of Development will act as liaison for the CITY. The Chairperson will act as liaison for the LAND BANK AUTHORITY.

7. Article 18 – Demolition, is a new provision that states the parties agree that the CITY is solely responsible for the demolition of NSP 2 properties acquired by the LAND BANK AUTHORITY and pursuant to the CITY'S Dangerous Building Ordinance. The CITY'S responsibilities include, but are not limited to, hiring the contractors, overseeing demolition work and paying for demolition activities. The LAND BANK AUTHORITY will assist in paying for a portion of the demolition activities. However, the CITY is responsible for administering the process.

8. Article 19 – Allocation of Program Income, is a new provision that states that all program income from property sales will be receipted to the CITY'S NSP 2 grant. All program income from vacant side lot sales will be receipted to the LAND BANK AUTHORITY'S NSP 2 grant.

9. That all terms of the original MOU will remain the same.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be signed by its authorized representatives as of the day and year first above written.

SAGINAW COUNTY LAND BANK AUTHORITY

By: Barbara L. Mausolf
Its: Chairperson

CITY OF SAGINAW, a Michigan municipal corporation

By: Odail Thoms, Jr.
Its: Dept. of Development Director

\ma\NSP2Assignments\agreements\memorandumofunderstanding\amendment

KOHL

REQUEST FOR SEALED BID PROPOSAL

CITY OF SAGINAW - PURCHASING OFFICE
RM #105, CITY HALL
1315 S. WASHINGTON AVENUE
SAGINAW, MICHIGAN 48601
(989) 759-1483

DATE: MAY 24 2010

BIDS DUE: JUNE 8, 2010 @ 3:00 PM

MARK ENVELOPE SEALED BID: #P842 -10

BIDS MUST BE RECEIVED IN THE PURCHASING OFFICE PRIOR TO 3:00 P.M. ON THE BID OPENING DATE. PLEASE NOTE: THE PURCHASING OFFICE NOW CLOSES AT 4:00 P.M. DAILY. AS SUCH, BIDS HAND-DELIVERED PRIOR TO THE ABOVE MENTIONED DEADLINE MUST BE RECEIVED BEFORE THE OFFICE CLOSES. The bidder hereby offers to furnish the goods and/or services described and for the prices named, as follows:

THE CITY OF SAGINAW IS SOLICITING SEALED PROPOSALS FOR BUILDING DEMOLITIONS WITH SPECIFICATIONS AS FOLLOWS:

NOTE: WE DO NOT ACCEPT SEALED BIDS VIA FAX OR EMAIL. A HARD COPY OF THIS DOCUMENT IS AVAILABLE ON THE CITY OF SAGINAW WEB SITE, www.saginaw-mi.com. (CLICK ON "QUICK LINKS", THEN PURCHASING) YOU CAN REFER TO THIS SITE FOR INFORMATION ON OUR FUTURE BID REQUIREMENTS AND BID RESULTS.

IF YOU RECEIVE A BID COPY FROM OUR WEB SITE, YOU CAN ALSO COMPLETE A COPY OF OUR "VENDOR COMPLIANCE FORM" AND RETURN IT TO US OR CONTACT OUR PURCHASING OFFICE SO YOU CAN BE FORMALLY ADDED TO THE RESPECTIVE BIDDERS LIST. (989) 759-1430

ALSO: IT IS VERY IMPORTANT THAT YOU PROVIDE AN E-MAIL ADDRESS AS THIS IS HOW YOU WILL BE NOTIFIED OF FUTURE BID OPPORTUNITIES.

EXHIBIT
C

YEAR ONE COSTS

ITEM	DESCRIPTION	COST	UNIT
1	Demolish structure in the City of Saginaw by building volume at a cost of: Prices to include plugging of sewer, termination of utilities as needed and proper removal and disposal of debris from site per specifications.	0.1175	Per CU.FT
2.	Foundation Removal which includes removal of crawlspace or basement walls, footings, and concrete floors in these spaces, by volume at a cost of:	1.52	Per CU.FT.
	Abestos Containing Material (ACM) removal		
3	Transite Siding	0.90	Per SQ.FT.
4	ACM Floor Tile/Linoleum	0.90	Per SQ.FT.
5	Windows w/ ACM Caulking	32.00	Per Window
6	ACM Pipe Insulation	3.58	Per L. Ft.
7	Duct Insulation	3.58	Per L. Ft.
8	Duct Tape	3.58	Per L. Ft.
9	Pipe Joint Insulation	10.00	Per Fitting
10	Drywall	1.43	Per SQ.FT.
11	Hard Plaster	1.43	Per SQ.FT
12	Granular Attic Insulation	5.61	Per CU.FT.
13	Tree Removal 12" – 18" Diameter	200.00	Per Tree
14	Tree Removal Over 18"	400.00	Per Tree
15	Debris Removal (Only for additional debris above that created by the structure itself)	25.00	Per CU.YD.
16	Slab on Grade Concrete Removal	0.65	Per SQ.FT.
17	Curb Replacement per City Engineering Specifications	17.00	Per L.FT.
18	Lot Grading and Seeding	0.10	Per SQ.FT.
19	Concrete Replacement	3.75	Per SQ.FT.

YEAR 2 COSTS

ITEM	DESCRIPTION	COST	UNIT
1	Demolish structure in the City of Saginaw by building volume at a cost of: Prices to include plugging of sewer, termination of utilities as needed and proper removal and disposal of debris from site per specifications.	0.1275	Per CU.FT
2.	Foundation Removal which includes removal of crawlspace or basement walls, footings, and concrete floors in these spaces, by volume at a cost of:	1.57	Per CU.FT.
	Abestos Containing Material (ACM) removal		
3	Transite Siding	0.90	Per SQ.FT.
4	ACM Floor Tile/Linoleum	0.90	Per SQ.FT.
5	Windows w/ ACM Caulking	32.00	Per Window
6	ACM Pipe Insulation	3.58	Per L. Ft.
7	Duct Insulation	3.58	Per L. Ft.
8	Duct Tape	3.58	Per L. Ft.
9	Pipe Joint Insulation	10.00	Per Fitting
10	Drywall	1.43	Per SQ.FT.
11	Hard Plaster	1.43	Per SQ.FT
12	Granular Attic Insulation	5.61	Per CU.FT.
13	Tree Removal 12" – 18" Diameter	200.00	Per Tree
14	Tree Removal Over 18"	400.00	Per Tree
15	Debris Removal (Only for additional debris above that created by the structure itself)	25.00	Per CU.YD.
16	Slab on Grade Concrete Removal	0.70	Per SQ.FT.
17	Curb Replacement per City Engineering Specifications	17.00	Per L.FT.
18	Lot Grading and Seeding	0.10	Per SQ.FT.
19	Concrete Replacement	3.75	Per SQ.FT.

SCOPE OF CONTRACTED SERVICES

The City of Saginaw will award work to the highest qualified contractor with the lowest accepted and approved bids. Contractors will be required to honor their bids for a period of two years with the City having the option of extending the period for an additional year provided that there are no changes in costs in the second year pricing.

The City of Saginaw shall award work in the following manner: Contractors shall be placed on a list with the contractor entering the lowest best bid receiving the first chance for work, second lowest best bid receiving second chance for work and so on. Work shall be awarded to the lowest and best bid until such time that the contractor cannot meet the volume demands as determined by the City at which time the City will award work to the second lowest best bid and so on until such time as the volume demands are met.

The work shall be performed in a workmanlike manner by a contractor licensed in the State of Michigan as either a Residential Builder or a Residential Maintenance and Alteration Contractor with a wrecking endorsement and licensed by the City of Saginaw as a Building Wrecker. A demolition permit shall be obtained from the Inspections Division before work is started.

BUILDING DEMOLITION

The buildings shall be completely demolished. All products of demolition shall be disposed of in a landfill or proper recycling area. Evidence of proper disposal shall be provided to the City of Saginaw with disposal tickets. The contractor shall take care to protect abutting properties, pedestrians, motorists, and existing improvements which are not to be removed (ie. City Side Walks). It is understood that heavy equipment is used in the demolition of these structures and this heavy equipment must be transported across existing City sidewalks and that damage may occur as a result. If damage occurs and the contractor can demonstrate that all precautions were taken to prevent damage to the sidewalks contractor may submit an invoice for the replacement of up to 16 lineal feet of City sidewalks, damages exceeding 16 lineal feet in length shall be the responsibility of the contractor. Photos of damaged City sidewalks are required per HUD regulations prior to replacement. Building demolition costs shall be determine by the cost per cubic foot of volume of each building. This shall include all enclosed living spaces, attics and covered porches. Photos of damaged City sidewalks are required per HUD regulations prior to replacement.

FOUNDATION REMOVAL

All foundation systems shall be removed completely including crawlspace walls, basement walls, footings, piers, and basement floors. All materials shall be disposed of in a proper manner either via a landfill or proper recycling area evidence of which shall be provided to the City of Saginaw upon request. Upon removal of below grade materials all excavations and cavities in the earth shall be filled with clean yellow sand or clay materials and covered with a minimum, after compaction, of four inches organic top soil approved in advance by the Chief Inspector. The contractor shall guarantee all fill materials against excessive settlement for a period of one year. All structures with below grade spaces are eligible for these charges. All utilities shall be terminated and/or plugged in accordance with the applicable rules, codes and standard practices and inspections of the capping or plugging of any utilities shall be inspected by the City of Saginaw Inspections Division prior to backfilling or covering. Calculations for these charges shall be based on the area from the average grade around the structure to the bottom of the basement or crawlspace floor. Basement or crawlspace area which is above grade shall be calculated based on the building demolition (Item #1 Pricing).

ACM REMOVAL ITEM #3 – ITEM #12

This work shall be performed in a workman like manner by a contractor and workers licensed and accredited in accordance with state and federal laws and regulations. All NESHAP regulations shall be strictly adhered to. All workers shall have completed the required accreditation or the Contractor must possess a license as an asbestos abatement contractor. Proof of such accreditation or license shall be submitted prior to award of contract.

The work includes the removal and disposal of all regulated asbestos containing materials prior to building demolition. The Contractor shall furnish all labor, materials, services, insurance fees, equipment, and disposal necessary for the complete removal of all regulated asbestos containing materials located at the site. The contractor shall at all times and for all aspects of the work perform in and maintain complete compliance with all applicable federal, state, and local regulations, policies, and guidelines. Evidence of proper disposal shall be submitted to the City per NESHAP.

Initial determination of the presence of and the amounts of asbestos within the site shall be the responsibility of the City of Saginaw. The initial survey will be an approximation. The contractor shall inspect the site and verify the amounts of asbestos removal work required with the Inspection Division prior to the commencement of any work. **IF DURING THE ACTUAL REMOVAL THE CONTRACTOR DISCOVERS SIGNIFICANTLY HIGHER AMOUNTS OF ACM, THE CONTRACTOR SHALL IMMEDIATELY NOTIFY THE INSPECTION DIVISION FOR VERIFICATION. ONCE AGREEMENT IS REACHED ON QUANTITIES THE ABATEMENT MAY CONTINUE.**

When required by law, the Contractor shall be responsible to prepare and submit to the appropriate agencies of the State of Michigan a notification of intent to remove/demolish using the current version of the State of Michigan approved form. The Contractor shall make all other notifications and reports required by applicable laws, regulations, policies and guidelines. Copies of all notifications shall be submitted to the City of Saginaw Inspections Division. The contractor is responsible for any and all state asbestos project fees.

The Contractor shall adhere to the following work procedures, when appropriate:

1. The contractor shall use the wet method of asbestos removal.
2. The contractor shall adhere to all state and federal requirements for workers, equipment, cleaning and decontamination.
3. The contractor shall place all ACM in appropriate containers with required labeling.
4. The contractor shall transport all ACM in labeled and approved containers to pre-designated disposal sites in accordance with the requirements of the Michigan Department of Environmental Quality or it equivalent.
5. When required by law, all workers shall wear approved protective clothing and respirators.
6. When required, the contractor shall complete a post-abatement air monitoring check as required by state and federal laws.
7. The contractor is responsible for assuring the site is clean and free of contaminates following the removal of asbestos materials.

TREE REMOVAL ITEM #13 AND ITEM #14

In some cases the contractor may be directed to remove trees that are existing on the site. Tree removal shall include the removal of all limbs, trunk, and stump and shall also include the filling of any hole left from excavating the stump. Disposal of all materials shall be as required by any state or local laws governing such disposal.

DEBRIS REMOVAL ITEM #15

In some cases additional debris may be present of the site. Additional debris removal costs will be calculation on a per cubic yard basis. If the contractor encounters significant additional debris they shall notify the Inspections Division immediately. City Inspections will document the additional debris and determine the appropriate costs. **UNDER NO CIRCUMSTANCES SHALL ADDITIONAL DEBRIS REMOVAL BE PAID FOR IF THE CITY INSPECTIONS DIVISION IS NOT CONTACTED AND THE EXISTENCE OF THE MATERIALS DOCUMENTED PRIOR TO ITS REMOVAL.**

CONCRETE SLAB REMOVAL ITEM #16

All concrete slabs on grade shall be removed from the site including but not limited to patios, driveways, drive approaches, private side walks and any other slabs located on the site. All areas where concrete is removed shall be restored such that the lot is level. Cost for this item shall be determined on a per square foot basis which shall include all of the above listed work.

CURB REPLACEMENT ITEM #17

In cases where a driveway approach is removed the Contractor shall replace the area of curb cut out for the driveway. This work shall be completed in accordance with the City of Saginaw Engineering Department Rules and Regulations for curb replacement. Cost for this work shall be calculated on cost per lineal foot basis.

LOT GRADING AND SEEDING ITEM #18

In some cases the contractor may be directed by the City of Saginaw to prepare the site for the application of grass seed and apply seed. The site shall be graded smooth and seed applied using the hydroseed method of application. Application shall be made in accordance with the seed suppliers recommendations. Grass seed shall be of a type that does not grow more than six inches in height and shall be acceptable to the City for this application. The cost of this service shall be determined on a cost per square foot basis.

CONCRETE REPLACEMENT ITEM #19

This item shall include the removal and replacement of any concrete flat work as directed by the City. The purpose of this item is only to remove and replace any concrete that is damaged as a result of the demolition process such as the access point with heavy equipment that damages or cracks a city sidewalk. Contractor shall take all precautions to avoid excessive damages to sidewalks and a maximum of sixteen lineal feet of City sidewalk replacement per address with be authorized under this item.

BASIS FOR DETERMINING THE LOWEST AND BEST BID

The City of Saginaw will evaluate the bids based on the following criteria and scoring method. Each contractor shall submit a per unit costs for each item as identified in the tables above. In addition each contractor shall demonstrate its experience in the demolition field and its capacity to complete large scale demolition projects. Each category will be scored in the following manner.

ITEM	DESCRIPTION	POINTS
1	Building Demolition	50
2	Foundation Removal	20
	Abestos Containing Material (ACM) removal	
3	Transite Siding	5
4	ACM Floor Tile	5
5	Windows w/ ACM Caulking	5
6	ACM Pipe Insulation	5
7	Duct Insulation	5
8	Duct Tape	5
9	Pipe Joint Insulation	5
10	Drywall	1
11	Hard Plaster	1
12	Granular Attic Insulation	1
13	Tree Removal 12" – 18" Diameter	5
14	Tree Removal Over 18"	5
15	Debris Removal (Only for additional debris above that created by the structure itself)	5
16	Slab on Grade Concrete Removal	10
17	Curb Replacement per City Engineering Specifications	3
18	Lot Grading and Seeding	4
19	Concrete Replacement	5
20	Experience and Capacity	20
	Total Possible Points	160

ADDITIONAL REQUIRMENTS

Insurance and Licenses:

Acceptable proof of the following shall be furnished and on file in the purchasing office prior to bid opening:

1. Worker's Compensation Insurance: All employees of the Contractor and sub-contractors engaging in the performance of work shall be covered by worker's compensation insurance in accordance with the Worker's Compensation Act.
2. Contractor's Public Liability and Property Damage: The contractor shall procure and shall maintain during the life of this contract, Public Liability Coverage Insurance per occurrence in an amount not less than $300,000 for injuries, including accidental death, to each person; and subject to the same limit for each person, in an amount not less than $300,000 on account of each accident or a combined single limit of not less than $300,000. This insurance must be secured from surplus lines carriers listed by the State as "admitted carriers" or "non-admitted approved carriers".
3. Automobile Liability Coverage: The contractor shall procure and shall maintain during the life of this contract, Automobile Liability Coverage Insurance in an amount not less than $300,000 per occurrence.

Other considerations:

1. General liability insurance with the above listed or higher limits. Insurance binders are not acceptable proof of insurance and will not be accepted.
2. A description of operations to clearly show that the coverage is for the type of demolition work to be performed.
3. A notation naming the City of Saginaw as an additional insured
4. A notation that the deductible for this insurance does not exceed $1000.00.
5. A current, valid City of Saginaw building wrecker's license
6. A current Residential Builder's License or Residential Maintenance and Alteration contractors license with a wrecking endorsement issued by the State of Michigan.
7. A copy of your asbestos removal certification
8. Proper certification of compliance with the City of Saginaw's Contract Compliance Ordinance.

TITLE 24
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
CHAPTER 1 SUBCHAPTER B
PART 135
SECTION 3 CLAUSE (135.20)

A.

work to be performed under this contract is on a project assisted under a program providing direct financial assistance from the Department of Housing and Urban Development and is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968 as amended, 12 U.S.C. 1701u. Section 3 requires that to the greatest extent feasible, opportunities for training and employment be given to lower income residents of the project area and contracts for work in connection with the project area and contracts for work in connection with the project be awarded to business concerns which are located in, or owned, in substantial part by persons residing in the area of the project.

B.

parties to this contract will comply with the provisions of said Section 3 and the regulations issued pursuant thereto by the Secretary of Housing and Urban Development set forth in CFR, Chapter I, Subchapter B, Part 135, and all applicable rules and orders of the Department issued thereunder prior to the execution of this contract. The parties to this contract certify and agree that they are under no contractual or other disability which would prevent them from complying with these requirements.

C.

Contractor will send to each labor organization or representative of workers with which he has a collective bargaining agreement or other contract or understanding, if any, a notice advising the said labor organization or workers, representative of his commitments under this Section 3 Clause and shall post copies of the notice in conspicuous place available to employees and applicants for employment or training.

D.

Contractor will include this Section 3 Clause in every subcontract for work in connection with the project and will at the direction of the applicant for or recipient of federal financial assistance, take appropriate action pursuant to the subcontract upon a finding that the subcontractor is in violation of regulations issued by the Secretary of Housing and Urban Development, 24 CFR Chapter I, Subchapter B, Part 135. The contractor will not subcontract with any subcontracting where it has notice or knowledge that the letter has been found in violation of regulation under 24 CFR Chapter I, Subchapter B, Part 135 and will not let any subcontract unless the subcontractor has first provided it with a preliminary statement of ability to comply with the requirements of these regulations.

E.

Compliance with the provisions of Section 3, the regulations set forth in 24 CFR Chapter I, Subchapter B, Part 135, and all applicable rules and orders of the Department issued thereunder prior to the execution of the contract, shall be a condition of the Federal financial assistance provided to the project, binding upon the applicant or recipient for such assistance, its successors and assigns. Failure to fulfill these requirements shall subject the

applicant or recipient, its contractors and subcontractors, its successors, and assigns to those sanctions specified by the grant or loan agreement or contract through which federal assistance is provided, and to such sanctions as are specified by CFR Chapter I, Subchapter B, Part 135.

CHECK LIST: BEFORE SUBMITTING YOUR BID

		YES
1.	Before submitting your bid, check our web-site bid copy to make sure there are no description, quantity or Addendums changes. (Go to www.saginaw-mi.com, click on "quick link" box and go to "Purchasing").	X
2.	Assuming they are permitted, if you're submitting an alternate(s) bid the pricing must be listed on page __ of this form and labeled as such. All support information should also be attached and labeled Alternate #1, #2, #3, etc.	X
3.	Is your bid signed by an authorized representative of your company?	X
4.	Have you provided the Terms & Delivery information requested?	X
5.	Is the OUTSIDE of your ENVELOPE properly labeled with the bid number?	X
6.	Are you submitting your original bid plus ONE (1) COPY as required?	X
7.	If your bid is over $100,000.00 do you have a Bid Bond, Certified Bank Check or Money Order enclosed?	X

a. Multiple year bids must be added together to get your total.
b. If submitting an alternate proposal along with your original bid, only one (1) of the above mentioned items is required.

NOTE: An original Bid Bond, Certified Check, Bank Money Order or Cashier's Check in the amount of three percent (3%) of the total amount bid must be submitted with any bid in excess of $100,000. Facsimiles or copies of bid bond will not be accepted and bid will be disqualified if submitted.

PAYMENT TERMS: NET 30 DAYS DELIVERY: 10 DAYS

FOB: CITY OF SAGINAW

SAGINAW, MI 48601

AS PART OF THE CONSIDERATION FOR THIS BID, THE UNDERSIGNED DOES HEREBY AGREE TO HAVE WITHHELD FROM ANY PAYMENT DUE THEM, ANY AMOUNTS OWED FOR TAXES, FEES OR OTHER CHARGES DUE THE CITY OF SAGINAW.

PER SECTION 14 OF THE CITY OF SAGINAW UNIFORM INCOME TAX ORDINANCE, THE TAX PERCENTAGE IS 1.5% ON INCOME EARNED FROM THE CITY. THE TAX SHALL APPLY ON THE TAXABLE NET PROFITS OF A CORPORATION DOING BUSINESS WITH THE CITY, BEING LEVIED ON SUCH PART OF THE TAXABLE NET PROFITS AS IS EARNED BY THE CORPORATION AS A RESULT OF WORK DONE, SERVICES RENDERED AND OTHER BUSINESS ACTIVITIES CONDUCTED WITH THE CITY, AS DETERMINED IN ACCORDANCE WITH THIS ORDINANCE.

ADDITIONAL BIDDER REQUIREMENTS:

INDEMNITY AND INSURANCE REQUIREMENTS

INDEMNITY:
The Contractor shall indemnify and save harmless the City of Saginaw, its officers and employees of and from all loss or damage caused to any person or property by reason of any carelessness or negligence in the doing or making of the work specified herein, and by reason of failure to pay all persons who shall supply said Contractor with materials, provisions and supplies for the performance and completion of said contract, and to promptly pay all just debts, dues and demands incurred in the completion of this contract, or of whatsoever other kind or nature, which shall be caused by delay or failure in the performance and completion of this contract, and further to indemnify and save harmless of and from all suits and actions the City of Saginaw, its officers and employees, on account of any injuries or damages sustained by any person or persons by reason of any act, or omission or negligence, or by the use of improper or defective material on the part of said Contractor in the performance of any part of this contract, and further to indemnify and protect any and all demands, fees or royalties for any patented invention, materials, articles, methods, arrangements or process of manufacture or any infringements thereon, that may be used on or be in any manner connected with the construction, erection or maintenance of the work, material, or any part thereof, embraced in this contract.

INSURANCE:
During the life of the contract, the Contractor shall effect and maintain the following types of insurance:

Comprehensive General Liability, including contractual liability with combined single-limit coverage of at least **$500,000 naming the City of Saginaw as additional insured.**

Automobile Liability

Worker's Disability Insurance

Such insurance shall be carried by financially responsible companies, licensed in the State of Michigan, and satisfactory to the City. The Contractor shall submit to the City for review and approval certificates of insurance for the above required coverage's. The certificate of insurance shall provide at least 30-days written notice to the City of any changes in the policy and any cancellation or termination thereof.

BIDDER REQUIREMENTS:

1. EACH PROPOSAL SHALL BE GOOD FOR 120 DAYS FROM THE BID OPENING DATE.

2. EACH BIDDER SHALL INCLUDE ONE (1) ADDITIONAL COPY OF YOUR PROPOSAL **"MARKED COPY".**

3. EACH BIDDERS ENVELOPE, FEDEX BOX/LETTER, UPS BOX/LETTER OR ANY OTHER METHOD OF SEALED DELIVERY **MUST HAVE THE BID NUMBER ON THE OUTSIDE** OF THE CONTAINER. **UNMARKED BIDS WILL BE DISQUALIFIED AND RETURNED UNOPENED!**

4. ALL BIDS OVER $100,000.00 MUST INCLUDE A BID BOND, CERTIFIED BANK CHECK OR MONEY ORDER. IF AGREEMENT IS FOR MULTIPLE YEARS, EACH YEAR SHOULD BE ADDED FOR YOUR TOTAL. (SEE "SEALED BID INSTRUCTIONS" PAGE)

5. EACH CITY OF SAGINAW DEPARTMENT SHALL BE VIEWED AS A SEPARATE ACCOUNT (NOT A BLANKET ACCOUNT) WITH THE RESPECTIVE SUCCESSFUL BIDDER(S).

6. WHEN A BRAND IS IDENTIFIED, OR WHEN A SPECIFIC METHOD OR PROCESS IS REQUESTED, YOU MAY QUOTE AN EQUAL. YOU MUST IDENTIFY THE BRAND, MODEL, PART NUMBER, ETC., METHOD OR PROCESS AND ENCLOSE LITERATURE VERIFYING EQUAL (WHEN APPLICABLE). CITY PERSONNEL RETAIN THE RIGHT TO DETERMINE EQUALS. IF THE ITEM(S) STATES "NO SUBSTITUTES," NO SUBSTITUTES WILL BE ACCEPTED.

7. ALL SHIPPING AND HANDLING CHARGES & ALL COST ASSOCIATED WITH THE DELIVERY, INSTALLATION AND/OR COMPLETION OF THE PRODUCT OR SERVICE REQUESTED MUST BE INCLUDED IN YOUR BID PRICE, INCLUDING BUT NOT LIMITED TO ANY TITLES, FEES, AND TRANSFER COST. ALL VEHICLES PURCHASED BY THE CITY SHALL BE TITLED TO "CITY OF SAGINAW". PLEASE CONSULT WITH THE PURCHASING OFFICE FOR TITLE AND LICENSE PLATE INSTRUCTIONS. WHERE APPLICABLE AND UNLESS OTHER WISE NOTED, YOUR BID PRICING MUST REMAIN CONSTANT FOR THE LENGTH OF THE AGREEMENT AND/OR CONTRACT PERIOD.

8. IN THE EVENT THE SUCCESSFUL BIDDER USES A THIRD PARTY COMPANY TO PROVIDE THE GOODS AND/OR SERVICES REQUESTED, THE SUCCESSFUL BIDDER MUST NOTIFY THE PURCHASING OFFICE BEFORE SAID GOODS ARE SHIPPED AND/OR SERVICES ARE PROVIDED. THE SUCCESSFUL BIDDER SHALL BE SOLELY RESPONSIBLE FOR PAYMENT TO THE THIRD PARTY COMPANY.

9. THE ITEMS ON THIS BID MAY BE REQUESTED ON AN AS NEEDED BASIS AS APPLICABLE.

10. ALL BIDS MUST BE RETURNED TO THE PURCHASING OFFICE AT 1315 S. WASHINGTON, SAGINAW, MI 48601, BY THE PREVIOUSLY STATED DUE DATE. PLEASE NOTE: THE PURCHASING OFFICE NOW CLOSES AT 4:00 P.M. DAILY. AS SUCH, BIDS HAND-DELIVERED PRIOR TO THE ABOVE MENTIONED DEADLINE MUST BE RECEIVED BEFORE THE OFFICE CLOSES.

THE SUCCESSFUL BIDDER WILL CONFORM TO ALL SPECIFICATIONS & REQUIREMENTS WHICH ARE ATTACHED AND INCORPORATED AS PART OF THIS BID. THE CITY RESERVES THE RIGHT TO ACCEPT OR REJECT ANY AND ALL BIDS, OR PARTS THEREOF, AND TO WAIVE ANY IRREGULARITIES IN THE BID EXCEPT THOSE SPECIFICALLY MENTIONED IN THE SEALED BID INSTRUCTIONS.

By signature, the bidder acknowledges that the signer has complete authority to execute the bid on behalf of the bidder and that the bid is genuine and not collusive in any manner; and that no other bidders were improperly induced to refrain from bidding or induced to submit a sham bid; and that the bidder agrees to have withheld from any payment due them, any amounts owed for taxes or other charges due the City of Saginaw; and that successful bidders are subject to mandatory City of Saginaw income tax withholdings.

COMPANY: ROHDE BROTHERS EXCAVATING, INC.

DATE: 6-8-2010

SIGNATURE: (INK) Richard A. Rohde Pres.

PRINTED NAME RICHARD A. ROHDE

TIITLE: PRESIDENT

ADDRESS: 1240 N. OUTER DRIVE
SAGINAW, MI 48601
TELEPHONE#: 989 753 0294
FAX#: 989 753 2028
EMAIL: brian.rohde@rohdebrothers.com VERY IMPORTANT!!!

IF THIS BID PROPOSAL IS SELECTED AS THE LOWEST AND BEST OFFER, IT WILL BE ACCEPTED IN THE FOLLOWING MANNER:

1) **THE CITY COUNCIL WILL APPROVE THIS BID PROPOSAL AT A REGULARLY SCHEDULED OR SPECIAL MEETING.**

2) **THE CITY'S PURCHASING OFFICER WILL SIGN THIS BID PROPOSAL ON BEHALF OF THE CITY. THE BID PROPOSAL SHALL THEN CONSTITUTE A WRITTEN CONTRACT BETWEEN THE PARTIES.**

3) **FOR ADMINISTRATIVE PURPOSES, THE CITY WILL ALSO ISSUE A SEQUENTIALLY NUMBERED PURCHASE ORDER.**

CITY OF SAGINAW, a Municipal Corporation

BY: _____ **DATE:** 7-13-10
(PURCHASING OFFICER)

1315 S. WASHINGTON
SAGINAW, MICHIGAN 48601
TELEPHONE: (989) 759-1430
FACSIMILE: (989) 759-1498

THE PURCHASE ORDER CONTRACT/WRITTEN CONTRACT CANNOT BE INCREASED OVER 10% OF THE TOTAL PURCHASE ORDER UP TO FIFTY THOUSAND 00/100 ($50,000.00) DOLLARS WITHOUT THE PRIOR APPROVAL OF CITY COUNCIL.

THIS OFFER IS ACCEPTED BY THE ISSUANCE OF A PURCHASE ORDER SIGNED BY THE CITY PURCHASING OFFICER FOR ALL OR ANY PORTION OF THIS BID AND SHALL CONSTITUTE A CONTRACT BETWEEN THE PARTIES.

ALL INVOICES MUST BE SUBMITTED WITHIN SIXTY (60) DAYS FROM THE TIME OF DELIVERY OF GOODS OR SERVICES OR THE COMPLETION OF PROJECTS. INVOICES MUST MAKE REFERENCE TO A VALID PURCHASE ORDER NUMBER IN ORDER TO BE PAID. ALL INVOICES THAT DO NOT REFERENCE A VALID PURCHASE ORDER NUMBER WILL BE RETURNED TO THE ORIGINAL SOURCE.

Client#: 1180 ROHBR

ACORD CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY): 04/29/2013

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER
Saginaw Bay Underwriters
Commercial Lines
1258 S. Washington P.O. Box 1928
Saginaw, MI 48605

CONTACT NAME:
PHONE (A/C, No, Ext): 989-752-8600 FAX (A/C, No):
E-MAIL ADDRESS:
PRODUCER CUSTOMER ID #:

INSURER(S) AFFORDING COVERAGE	NAIC #
INSURER A: Cincinnati Ins. Co.	
INSURER B: ABC Mi. Self-Ins'd Workers Comp	
INSURER C: Chubb/Pacific Ins. Group	
INSURER D:	
INSURER E:	
INSURER F:	

INSURED
Rohde Brothers Excavating, Inc.
1240 N. Outer Drive
P.O. Box 14979
Saginaw, MI 48601-0979

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
A	GENERAL LIABILITY			EPP0031749	08/01/2010	08/01/2013	EACH OCCURRENCE	$1,000,000
	X COMMERCIAL GENERAL LIABILITY						DAMAGE TO RENTED PREMISES (Ea occurrence)	$100,000
	CLAIMS-MADE X OCCUR						MED EXP (Any one person)	$10,000
	X PD Ded:500						PERSONAL & ADV INJURY	$1,000,000
							GENERAL AGGREGATE	$2,000,000
	GEN'L AGGREGATE LIMIT APPLIES PER: POLICY PRO-JECT LOC						PRODUCTS - COMP/OP AGG	$2,000,000
								$
A	AUTOMOBILE LIABILITY			EBA0028414	08/01/2012	08/01/2013	COMBINED SINGLE LIMIT (Ea accident)	$1,000,000
	ANY AUTO						BODILY INJURY (Per person)	$
	ALL OWNED AUTOS						BODILY INJURY (Per accident)	$
	X SCHEDULED AUTOS						PROPERTY DAMAGE (Per accident)	$
	X HIRED AUTOS							$
	X NON-OWNED AUTOS							$
	X Drive Other Car							
A	X UMBRELLA LIAB X OCCUR			EPP0031479	08/01/2010	08/01/2013	EACH OCCURRENCE	$5,000,000
	EXCESS LIAB CLAIMS-MADE						AGGREGATE	$5,000,000
	DEDUCTIBLE							$
	X RETENTION $ 0							$
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y/N			ROHDE2C	05/01/2013	05/01/2014	X WC STATU-TORY LIMITS OTH-ER	
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? N (Mandatory in NH)	N/A					E.L. EACH ACCIDENT	$500,000
	If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. DISEASE - EA EMPLOYEE	$500,000
							E.L. DISEASE - POLICY LIMIT	$500,000
C	Leased & Rented			06659639	08/01/2012	08/01/2013	$600,000	
							$1,000 Deductible	

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, If more space is required)
** Supplemental Name **
Rohde Brothers Excavating, Inc.
(See Attached Descriptions)

CERTIFICATE HOLDER
City of Saginaw City Hall
1315 S Washington Ave
Saginaw, MI 48601-2599

CITY OF SAGINAW MI
MAY 0 3 2013
PURCHASING OFFICE

CANCELLATION
SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

DESCRIPTIONS (Continued from Page 1)

Rohde Land Development Company
Rohde Development, LLC
Rohde Environmental Services, Inc
Joseph Rohde Rentals, LLC
Certificate Holder is Additional Insured with respects to the General Liability.
Project: Demonlition Work to be performed

- WunderMap Radar
- NEXRAD Radar
- U.S. Regional Radar
- Satellite
- All Weather Maps

- Weather Alerts
- Hurricane & Tropical Cyclones
- US Severe Weather Map
- Convective Outlook
- Wildfires
- Preparedness

- Dr. Jeff Masters
- All Weather Blogs
- Recent News Stories

- WunderPhotos
- Webcams
- Videos

- Ski & Snow Reports
- Marine Weather
- Sailing Weather

- Maps & Radar
- Severe Weather
- News & Blogs
- Photos & Video
- Activities
- More

- Maps & Radar
- Severe Weather
- News & Blogs
- Photos & Video
- Activities
- Historical Weather
- Climate Change
- Personal Weather Station Network
- Mobile Apps
- Weather API for Developers
- Site Map

- WunderMap Radar
- NEXRAD Radar
- U.S. Regional Radar
- Satellite
- All Weather Maps

- Weather Alerts
- Hurricane & Tropical Cyclones
- US Severe Weather Map
- Convective Outlook
- Wildfires
- Preparedness

- Dr. Jeff Masters
- All Weather Blogs
- Recent News Stories

- WunderPhotos
- Webcams
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2012

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Tuesday, September 18, 2012

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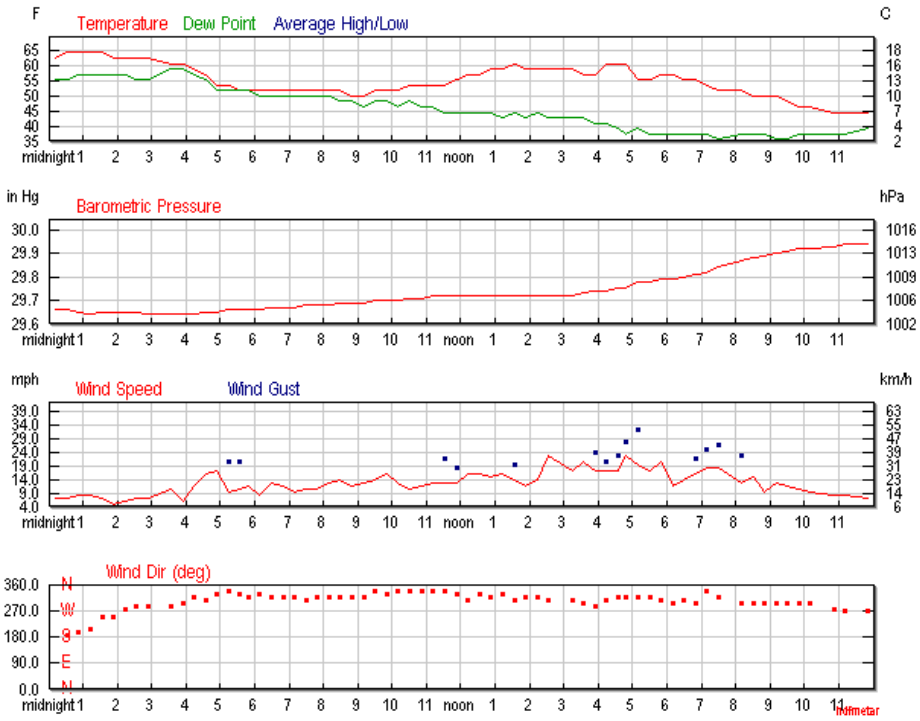
	Actual	Average (KMBS)	Record (KMBS)
Temperature			
Mean Temperature	**54** °F	**60** °F	
Max Temperature	**64** °F	**71** °F	**84** °F (2007)
Min Temperature	**44** °F	**50** °F	**41** °F (1999)
Degree Days			
Heating Degree Days	11		
Month to date heating degree days			
Since 1 July heating degree days			
Cooling Degree Days	0		
Month to date cooling degree days			
Year to date cooling degree days			
Growing Degree Days	4 (Base 50)		

	Actual	Average (KMBS)	Record (KMBS)
Moisture			
Dew Point	**46** °F		
Average Humidity	73		
Maximum Humidity	100		
Minimum Humidity	42		
Precipitation			
Precipitation	**0.00** in	**0.13** in	**0.09** in (2010)
Month to date precipitation		2.32	
Year to date precipitation		22.84	
Snow			
Snow	**0.00** in	-	- ()
Month to date snowfall			
Since 1 July snowfall			
Since 1 September snowfall			
Snow Depth	-		
Sea Level Pressure			
Sea Level Pressure	**29.73** in		
Wind			
Wind Speed	**11** mph (NW)		
Max Wind Speed	**23** mph		
Max Gust Speed	**32** mph		
Visibility	**10** miles		
Events	Rain		

Click here for data from the nearest station with official NWS data (KMBS).

T = Trace of Precipitation, MM = Missing Value Source: NWS Daily Summary

Daily Weather History Graph



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Date:

September

18

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Astronomy

Sep. 18, 2012	Rise	Set
Actual Time	7:18 AM EDT	7:39 PM EDT
Civil Twilight	6:50 AM EDT	8:07 PM EDT
Nautical Twilight	6:16 AM EDT	8:41 PM EDT
Astronomical Twilight	5:41 AM EDT	9:15 PM EDT
Moon	10:24 AM EDT (9/18)	8:53 PM EDT (9/18)
Length of Visible Light	13h 17m	
Length of Day	12h 20m	

Waxing Crescent, 9% of the Moon is Illuminated

Sep 18	Sep 22	Sep 29	Oct 8	Oct 15
Waxing Crescent	First Quarter	Full	Last Quarter	New

Visit Astronomy

Hourly Weather History & Observations

Time (EDT)	Temp.	Windchill	Dew Point	Humidity	Pressure	Visibility	Wind Dir	Wind Speed	Gust Speed	Precip	Events	Conditions
12:13 AM	**62.6** °F	-	**55.4** °F	77%	**29.66** in	**10.0** mi	South	**6.9** mph	-	N/A		Clear
12:33 AM	**64.4** °F	-	**55.4** °F	73%	**29.66** in	**10.0** mi	South	**6.9** mph	-	N/A		Clear
12:53 AM	**64.4** °F	-	**57.2** °F	77%	**29.65** in	**10.0** mi	SSW	**8.1** mph	-	N/A		Clear
1:13 AM	**64.4** °F	-	**57.2** °F	77%	**29.64** in	**10.0** mi	SSW	**8.1** mph	-	N/A		Clear
1:33 AM	**64.4** °F	-	**57.2** °F	77%	**29.65** in	**10.0** mi	WSW	**6.9** mph	-	N/A		Mostly Cloudy
1:53 AM	**62.6** °F	-	**57.2** °F	82%	**29.65** in	**10.0** mi	WSW	**4.6** mph	-	N/A		Scattered Clouds
	62.6 °F	-	**57.2** °F	82%	**29.65** in	**10.0** mi	West	**5.8** mph	-	N/A		

Time (EDT)	Temp.	Windchill	Dew Point	Humidity	Pressure	Visibility	Wind Dir	Wind Speed	Gust Speed	Precip	Events	Conditions
2:13 AM												Mostly Cloudy
2:33 AM	62.6 °F	-	55.4 °F	77%	29.65 in	10.0 mi	WNW	6.9 mph	-	N/A		Overcast
2:54 AM	62.6 °F	-	55.4 °F	77%	29.64 in	10.0 mi	WNW	6.9 mph	-	N/A		Overcast
3:34 AM	60.8 °F	-	59.0 °F	94%	29.64 in	10.0 mi	WNW	10.4 mph	-	N/A	Rain	Light Rain
3:54 AM	60.8 °F	-	59.0 °F	94%	29.64 in	10.0 mi	WNW	5.8 mph	-	N/A		Light Drizzle
4:14 AM	59.0 °F	-	57.2 °F	94%	29.64 in	10.0 mi	NW	11.5 mph	17.3 mph	N/A		Overcast
4:34 AM	57.2 °F	-	55.4 °F	94%	29.65 in	10.0 mi	NW	16.1 mph	-	N/A	Rain	Light Rain
4:54 AM	53.6 °F	-	51.8 °F	94%	29.65 in	7.0 mi	NNW	17.3 mph	23.0 mph	N/A	Rain	Light Rain
5:14 AM	53.6 °F	-	51.8 °F	94%	29.66 in	7.0 mi	NNW	9.2 mph	20.7 mph	N/A	Rain	Rain
5:34 AM	51.8 °F	-	51.8 °F	100%	29.66 in	7.0 mi	NNW	10.4 mph	20.7 mph	N/A	Rain	Rain
5:49 AM	51.8 °F	-	51.8 °F	100%	29.66 in	10.0 mi	NW	11.5 mph	-	N/A	Rain	Rain
6:09 AM	51.8 °F	-	50.0 °F	94%	29.66 in	10.0 mi	NNW	8.1 mph	-	N/A	Rain	Light Rain
6:30 AM	51.8 °F	-	50.0 °F	94%	29.67 in	10.0 mi	NW	12.7 mph	-	N/A	Rain	Rain
6:50 AM	51.8 °F	-	50.0 °F	94%	29.67 in	10.0 mi	NW	11.5 mph	-	N/A	Rain	Light Rain
7:10 AM	51.8 °F	-	50.0 °F	94%	29.67 in	10.0 mi	NW	9.2 mph	-	N/A	Rain	Light Rain
7:30 AM	51.8 °F	-	50.0 °F	94%	29.68 in	10.0 mi	NW	10.4 mph	-	N/A	Rain	Light Rain
7:50 AM	51.8 °F	-	50.0 °F	94%	29.68 in	10.0 mi	NW	10.4 mph	-	N/A		Overcast
8:10 AM	51.8 °F	-	50.0 °F	94%	29.68 in	10.0 mi	NW	12.7 mph	-	N/A		Overcast
8:30 AM	51.8 °F	-	48.2 °F	88%	29.69 in	10.0 mi	NW	13.8 mph	18.4 mph	N/A		Scattered Clouds
8:50 AM	50.0 °F	-	48.2 °F	94%	29.69 in	10.0 mi	NW	11.5 mph	-	N/A		Clear
9:10 AM	50.0 °F	-	46.4 °F	87%	29.69 in	10.0 mi	NW	12.7 mph	17.3 mph	N/A		Clear
9:31 AM	51.8 °F	-	48.2 °F	88%	29.70 in	10.0 mi	NNW	13.8 mph	-	N/A		Clear
9:51 AM	51.8 °F	-	48.2 °F	88%	29.70 in	10.0 mi	NNW	16.1 mph	-	N/A		Scattered Clouds
10:11 AM	51.8 °F	-	46.4 °F	82%	29.70 in	10.0 mi	NNW	12.7 mph	-	N/A		Scattered Clouds

Time (EDT)	Temp.	Windchill	Dew Point	Humidity	Pressure	Visibility	Wind Dir	Wind Speed	Gust Speed	Precip	Events	Conditions
10:31 AM	53.6 °F	-	48.2 °F	82%	29.71 in	10.0 mi	NNW	10.4 mph	18.4 mph	N/A		Mostly Cloudy
10:51 AM	53.6 °F	-	46.4 °F	77%	29.71 in	10.0 mi	NNW	11.5 mph	-	N/A		Mostly Cloudy
11:11 AM	53.6 °F	-	46.4 °F	77%	29.72 in	10.0 mi	NNW	12.7 mph	19.6 mph	N/A		Overcast
11:32 AM	53.6 °F	-	44.6 °F	72%	29.72 in	10.0 mi	NNW	12.7 mph	21.9 mph	N/A		Mostly Cloudy
11:53 AM	55.4 °F	-	44.6 °F	67%	29.72 in	10.0 mi	NNW	12.7 mph	18.4 mph	N/A		Mostly Cloudy
12:13 PM	57.2 °F	-	44.6 °F	63%	29.72 in	10.0 mi	NW	16.1 mph	-	N/A		Mostly Cloudy
12:33 PM	57.2 °F	-	44.6 °F	63%	29.72 in	10.0 mi	NNW	16.1 mph	19.6 mph	N/A		Overcast
12:53 PM	59.0 °F	-	44.6 °F	59%	29.72 in	10.0 mi	NW	15.0 mph	-	N/A		Overcast
1:13 PM	59.0 °F	-	42.8 °F	55%	29.72 in	10.0 mi	NNW	16.1 mph	23.0 mph	N/A		Mostly Cloudy
1:33 PM	60.8 °F	-	44.6 °F	55%	29.72 in	10.0 mi	NW	13.8 mph	19.6 mph	N/A		Mostly Cloudy
1:53 PM	59.0 °F	-	42.8 °F	55%	29.72 in	10.0 mi	NW	11.5 mph	-	N/A		Mostly Cloudy
2:14 PM	59.0 °F	-	44.6 °F	59%	29.72 in	10.0 mi	NW	13.8 mph	-	N/A		Overcast
2:34 PM	59.0 °F	-	42.8 °F	55%	29.72 in	10.0 mi	NW	23.0 mph	27.6 mph	N/A		Mostly Cloudy
3:14 PM	59.0 °F	-	42.8 °F	55%	29.72 in	10.0 mi	NW	17.3 mph	-	N/A		Mostly Cloudy
3:34 PM	57.2 °F	-	42.8 °F	59%	29.73 in	10.0 mi	WNW	20.7 mph	25.3 mph	N/A		Overcast
3:54 PM	57.2 °F	-	41.0 °F	55%	29.74 in	10.0 mi	WNW	17.3 mph	24.2 mph	N/A		Overcast
4:14 PM	60.8 °F	-	41.0 °F	48%	29.74 in	10.0 mi	NW	17.3 mph	20.7 mph	N/A		Scattered Clouds
4:34 PM	60.8 °F	-	39.2 °F	45%	29.75 in	10.0 mi	NW	17.3 mph	23.0 mph	N/A		Mostly Cloudy
4:49 PM	60.8 °F	-	37.4 °F	42%	29.75 in	10.0 mi	NW	23.0 mph	27.6 mph	N/A		Overcast
5:10 PM	55.4 °F	-	39.2 °F	54%	29.78 in	10.0 mi	NW	19.6 mph	32.2 mph	N/A		Overcast
5:30 PM	55.4 °F	-	37.4 °F	51%	29.78 in	10.0 mi	NW	17.3 mph	-	N/A		Overcast
5:50 PM	57.2 °F	-	37.4 °F	48%	29.79 in	10.0 mi	NW	20.7 mph	25.3 mph	N/A		Mostly Cloudy
6:10 PM	57.2 °F	-	37.4 °F	48%	29.79 in	10.0 mi	WNW	11.5 mph	-	N/A		Scattered Clouds
6:30 PM	55.4 °F	-	37.4 °F	51%	29.80 in	10.0 mi	NW	13.8 mph	18.4 mph	N/A		Scattered Clouds

Time (EDT)	Temp.	Windchill	Dew Point	Humidity	Pressure	Visibility	Wind Dir	Wind Speed	Gust Speed	Precip	Events	Conditions
6:50 PM	**55.4** °F	-	**37.4** °F	51%	**29.81** in	**10.0** mi	WNW	**16.1** mph	**21.9** mph	N/A		Clear
7:10 PM	**53.6** °F	-	**37.4** °F	54%	**29.82** in	**10.0** mi	NNW	**18.4** mph	**25.3** mph	N/A		Mostly Cloudy
7:30 PM	**51.8** °F	-	**35.6** °F	54%	**29.84** in	**10.0** mi	NW	**18.4** mph	**26.5** mph	N/A		Mostly Cloudy
8:11 PM	**51.8** °F	-	**37.4** °F	58%	**29.87** in	**10.0** mi	WNW	**12.7** mph	**23.0** mph	N/A		Overcast
8:31 PM	**50.0** °F	-	**37.4** °F	62%	**29.88** in	**10.0** mi	WNW	**15.0** mph	-	N/A		Mostly Cloudy
8:51 PM	**50.0** °F	-	**37.4** °F	62%	**29.89** in	**10.0** mi	WNW	**9.2** mph	-	N/A		Mostly Cloudy
9:11 PM	**50.0** °F	-	**35.6** °F	58%	**29.90** in	**10.0** mi	WNW	**12.7** mph	**18.4** mph	N/A		Mostly Cloudy
9:31 PM	**48.2** °F	-	**35.6** °F	62%	**29.91** in	**10.0** mi	WNW	**11.5** mph	-	N/A		Scattered Clouds
9:51 PM	**46.4** °F	**41.5** °F	**37.4** °F	71%	**29.92** in	**10.0** mi	WNW	**10.4** mph	-	N/A		Clear
10:11 PM	**46.4** °F	**41.9** °F	**37.4** °F	71%	**29.92** in	**10.0** mi	WNW	**9.2** mph	-	N/A		Clear
10:51 PM	**44.6** °F	**40.2** °F	**37.4** °F	76%	**29.93** in	**10.0** mi	West	**8.1** mph	-	N/A		Clear
11:12 PM	**44.6** °F	**40.2** °F	**37.4** °F	76%	**29.94** in	**10.0** mi	West	**8.1** mph	-	N/A		Clear
11:52 PM	**44.6** °F	**40.7** °F	**39.2** °F	81%	**29.94** in	**10.0** mi	West	**6.9** mph	-	N/A		Clear

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- Mobile Apps
- Weather API for Developers

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

JONES FAMILY TRUST,
SYLVIA JONES, and
BOBBY JONES
Plaintiffs,

v.

SAGINAW COUNTY LAND BANK AUTHORITY; CITY OF SAGINAW; ROHDE BROS. EXCAVATING, INC.; and HARDHAT DOE, an unknown employee
Defendants
_____/

Case No.: 13-019698-NZ-2
Honorable Robert L. Kaczmarek

AFFIDAVIT

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AFFIDAVIT OF WALTER MARTLEW

State of Michigan)
County of Kalamazoo) ss.

Walter Martlew, being duly sworn, states:

1. I serve as an expert for Plaintiffs in the above-referenced case.

2. Attached is my report which I generated and authored after conducting an inspection of the home being the subject of the lawsuit.

3. I am incorporating the written portion of the report into this affidavit as if republished within this affidavit.

4. If sworn, I could testify competently to the facts contained within this affidavit and the attached report based upon my personal knowledge.

Walter Martlew

Walter Martlew, Affiant

May 12, 2014

Date

Signed and sworn to before me, this 12 day of May, 2014 by Walter Martlew.

Notary's Signature: Leslie C. MacKie

Notary's Name: Leslie C MacKie

Notary public, Kalamazoo County, State of Michigan

Acting in County of _____, Michigan

My commission expires: 12-19-2019

April 3, 2013

Mrs. Sylvia Jones
339 S. Fifth Street
Saginaw, Michigan 48602

sent care of
Mr. Philip Ellison, Esq.
Outside Legal Counsel
4855 State Street, Suite 6A
Saginaw, Michigan 48603

RE: Damage Assessment, 339 S. Fifth Street

Dear Mrs. Jones:

This report is written pursuant to the onsite assessment of the property located at 339 S. Fifth Street, Saginaw, Michigan. The assessment was conducted by Mr. Sam Hudson and me on Tuesday, April 2, 2013.

At issue is a determination of the extent of damages caused by the demolition of the structure on an adjacent property, 343 S. Fifth St. During the demolition of this structure, a portion of the roof and north wall was dislodged and fell in an uncontrolled manner, striking your residence, the property on which our assessment was conducted. This event was recorded by a security camera set at the second floor level on the southeast corner of your house. The camera faces westward to monitor the south wall elevation of the house, pointing toward the rear of the structure.

To properly conduct the assessment, Sam and I spent time in the house, outside around its perimeter, and in the crawl space below. Extensive time was spent under the structure in the crawl space so the condition of hard-to-reach spaces could be duly noted.

In my initial conversation with you I recall you making comments as follows:

- As a result of the building strike you were forced to move from your residence; it has been unoccupied since you moved.
- Following receipt of an excessively high heating bill, you had the gas service turned off. The structure, thus, went through this past winter unheated.
- The floor of the first floor front bedroom closet now sags as it never did before; your concern that the floor could collapse has kept you from entering the space to retrieve clothing stored there. This concern was reinforced by comments made by a local building restoration contractor, with whom you spoke.

- Following the strike, the main floor front bedroom heat registered failed to expel warm air, even though the furnace was on.
- Plaster cracks have developed, with a portion of plaster falling from the ceiling near the front entryway.
- Doors that used to close no longer do.
- Throughout the main level, the floor has buckled excessively; it was not in that condition prior to the strike.

FINDINGS

Crawlspace

The floor of the crawlspace is a very moist, organic, loamy soil. Due to the susceptibility of this type of soil to heave through a freeze/thaw cycle, current building codes would require its removal prior to construction. Such was not the case, however, when the house was built.

Foundation

Most of the house is supported on masonry block (CMU) pilasters. With the exception of the very rear portion of the house, which appears to have a foundation constructed of brick and mortar, no continuous foundation wall was noted.

Given the age of the house, the pilasters are obviously replacement. CMUs did not exist at the time the house was built. Interesting, however, it was noted that, in multiple locations, wood shims sit between the top of the pilasters and the underside of flooring support girders that rest on them. The shims are identical to wood used elsewhere in the structure, so they must be part of the original framing. A reasonable conclusion can be drawn that the pilaster configuration was part of the original construction, and the original pilasters were later replaced with CMU pilasters.

Out of curiosity I decided to determine the depth of a pilaster. One immediately to the left of the east entryway to the crawlspace was readily accessible. Excavating down, I discovered the pilaster starts only about four inches below grade, and rests on the afore mentioned organic, loamy soil.

The pilaster support methods employed here would never be allowed by current construction codes. However, the fact that the house has stood for well over 100 years and structurally is in relatively good condition serves as a testament that this system worked to provide a firm foundation and sturdy structure.

Main Floor Framing

As noted before, large wooded 6"x8" girders sit atop the pilasters and span between them. 2"x10" floor joists then sit atop the girders to create the floor framing. The joists are "notched" onto the girders* and are spaced at 16" on center (nominal). From my recollection, double 2x10 rim joists run the length of the building. These serve as the bearing point for the wall framing above.

* "Notching" means the lower portion of the joist that rests on the girder is cut

out. I believe this was done to increase lateral stability. When done properly, notching would not diminish the strength of the component.

Hewn 1x12 planks create the subfloor; they may be ship lapped or edge butted. The underside of the subfloor is visible from below. Standard construction of this era would then have finished hardwood flooring rest on top of the subfloor. Though not visible, I believe that is in place.

Wall Construction

Houses of this era typically were built using a method referred to as balloon framing. This is evidenced in one of the interior building walls where the stud work framing is exposed.

Balloon framing uses single vertical studs that run the full height of the wall, from its lowest point up to the underside of the eaves. At the appropriate heights, floor framing is then lapped and fastened into the side of the wall studs. There were several common methods used for fastening; that detail is not visible here, but lack of that knowledge is of no consequence.

Once framed, the exterior of the balloon framed wall was sheathed with 1x (8 / 10 / 12)" wood slat boards set horizontally. Some gaps were common between planks, but relative to the board dimensions, the gaps were not significant. Plank ends were staggered row to row; the entire wall was sheathed in this manner. The exterior finish surface (shingles, lap siding, brick) would then be applied.

Balloon framed construction is very strong and sturdy: continuous studs top-to-bottom, with no joints; lateral support in the horizontal plane provided by integrated floor framing; lateral support in the vertical plane provided by abutted interior wall framing; solid fastening using true-dimension nails; and (near) continuous exterior wall sheathing, all working together as a single unit to create a durable structure. With framing and sheathing constructed as noted, a lateral force gets distributed across the entire wall section

Two other points that pertain to the quality of the original construction material used are pertinent to note:

I. Unlike today, all lumber used in the construction of this house is true to its dimensional reference. That is to say, a 2x10 measures 2" by 10". Today's lumber of the same dimensional reference measures 1 1/2" x 9 1/2".
II. The dimensional lumber used in this structure was harvested from "old growth" forests. (That was all that existed then.) Unlike today, long, straight-grain boards, free of checks and cracks were readily available. In every regard, the lumber used in the construction of this structure would be considered premium grade by today's standards. It surpasses in quality anything we have readily available.

ASSESSMENT

In the previous section I described the structural integrity of the house. As proof, even though the house took a severe wallop from the crashing incident, it is still very sound, structurally. The south wall of the house still stands true vertically. A wall built using today's standard construction methods would not have fared as well, and could have separated at any joint or points where components are fastened together.

As Sam and I inspected the foundation and floor framing details we looked intently for evidence of movement that would denote structural damage. We found only one area that might evidence such: Toward the front of the house there is a floor joist that is unsupported on one end. It is possible that this joist was knocked loose from a rim joist support through flexing of the house on impact; debris in the way precluded us from doing a thorough inspection of the area. Other explanations may exist as well. This joist is in the vicinity of the front bedroom closet and it may be the cause of the closet floor sagging as you so noted.

Though the house does not appear to have suffered severe structural damage, it certainly suffered significant damage in other areas. Sam and I believe these are directly attributable to the strike incident. These damages made the house uninhabitable and have a direct correlation to its present condition. From our observations, we noted:

I. A portion of plaster has broken loose near the front entryway, and a large hole in the ceiling and wall surfaces now exists. In other locations, it appears that the plaster has cracked or is delaminated. Repairs would be required prior to reoccupancy. A larger problem, however, may now exist.

II. Asbestos was once used so extensively that it was a nearly ubiquitous product. It is highly possible the plaster in the house contains asbestos, in which case a whole-house remediation would be required. (This would be consistent with another comment you made regarding how long the asbestos remediation process took at the 343 address property.)

A rule of thumb for building inspection is that existing deviations from codes are allowed to exist until such time that repair work or upgrades are done.** Though allowed to exist, once you touch a noncompliant issue you need to bring it into conformity. If asbestos remediation is required, that alone adds significant cost to the building repair project.

** An exception to this rule is if a life-threatening condition exists. However, fully encapsulated asbestos is not considered to be life threatening.

III. PVC potable water and drain lines are hanging in a haphazard manner in the crawlspace. Our suspicion is that the house flexed when struck, jarring the pipes loose from their hanger brackets and other supports. As a result, plumbing system integrity cannot be guaranteed, and all plumbing would have to be replaced to preclude potential failure. (I assume, to the extent the original house had plumbing,

it was probably a cast iron pipe system. Due to age and deterioration, the original was replaced. PVC was used, both for the potable water and sanitary drain systems.)

IV. A gas supply pipe that runs through the crawlspace hangs unsupported. Currently, the natural gas service is turned off so the integrity of this line cannot be verified. Prior to any future gas supply turn-on, the gas supply line needs to be rehung, and thoroughly inspected for leaks.

V. Because the house has no basement, the furnace is located on the first floor. A down draft furnace is used to push warm air into a galvanized sheet metal plenum which is then connected to a rectangular sheet metal trunk (main supply) line. Air flows through the trunk and is then distributed to individual rooms via arterial ductwork. The arterial ductwork is made up of insulated flex duct (plastic coated insulation with a spiral wire core to maintain its shape). Galvanized sheet metal fittings are affixed at the junction points. The age of this heating system is unknown; it is obviously not original equipment, though. The plenum and ductwork system is located in the crawlspace.

The entire ductwork system in the crawlspace broke loose from whatever support previously existed and lays in disarray on the crawlspace floor. Some connector points have been torn loose; the arterial duct that feeds the front bedroom is pinched shut because the flex duct is now draped across a hanger wire. Whatever efficiency existed in the heating system was lost when this damage occurred. Prior to future use, the entire system would have to be rebuilt.

As a side note, the fractured duct system has severely impacted the efficiency of the forced air heat system, and is the probable cause of the excessively high heat bill.

Continuing, we need to address the excessive warping of the floors, and doors that no longer close. We are inclined to believe these conditions now exist not due to structural damage caused by the strike, but rather, structural damage caused by frost heave. Through the house's history, this never became an issue until it went through a winter unheated. Please recall:

- The bearing soil was noted to be moist, loamy and organic. It is highly susceptible to frost heave. While not being anything we would want to build on today, it did have sufficient bearing capacity to support the structure.
- Foundation support pilasters are vey shallow and bear directly on the loamy soil. They do not extend below the frost line.
- The main heat supply trunk is in the crawlspace - uninsulated galvanized sheet metal ductwork.

Until this past winter, the house was occupied and always heated during the cold weather season. Heat radiating from the main supply duct simply kept the crawlspace sufficiently warm so the soil could never freeze. Thus, heaving never occurred.

For occupancy to be granted for the house, it is necessary to jack the house up and install a new code-compliant foundation system. Over time a good portion of the misalignments caused by heaving may settle out. The cost of performing these activities, though, will be very expensive.

Lastly, very strange damage is evident on the west gable of the two story portion. We assume this was caused by the house flexing during the strike.

In summary of our observations and assessments Sam and I are of the opinion that:

I. The house is very old and worn, and exhibits signs of age (sagging roof lines; et al) but structurally, is in relatively good condition. It is not possible to apportion "wear/ age/sag" and other observations that denote deterioration between the two components, physical age and the strike event.

II. Repairs and upgrades have been performed, some of which show evidence of low quality workmanship.

III. The building suffered a severe lateral blow cause by the adjacent property demolition activities. While this caused extensive damage to finishes and systems, the structure endured the blow quite well.

IV. Extensive upgrades required to make the structure code compliant may make the total cost of repairs impractical to consider.

For reference, Sam's and my credentials are as follows:

Barney Martlew

* Registered Professional Engineer, State of Michigan; license no. 29941
* Building Inspector/Plan Reviewer, State of Michigan; license no. 005511 (status: inactive.)

Sam Hudson

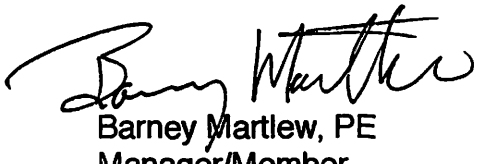
* Licensed Residential Builder, State of Michigan; license no. 2101109753

Included herewith are:

- Files containing pictures taken while performing the assessment. References made to picture locations (see Appendix A, to follow) are limited, as they are primarily meant to show existing conditions.
- A transposed copy of our hand-written field notes.

Sam and I wish you the best as you pursue resolution to the matter of your loss. Please let us know if we may be of further service.

Sincerely,
Visidio Partners, LLC



Barney Martlew, PE
Manager/Member

cc: Sam Hudson
File

Appendix A
Photo Identification & Descriptions

IMG NO.	DESCRIPTION
00204	Crawlspace: pier; fallen ductwork, insulation, plumbing
00205	Crawlspace: fallen ductwork, insulation, plumbing
00207	Crawlspace: insulation, plumbing
00208	Crawlspace: fallen gas line
00209	Crawlspace: fallen ductwork, insulation, plumbing
00210	Crawlspace: pier; fallen ductwork
00211	Crawlspace: pier, note shims; fallen joist (illuminated free end)
00212	Crawlspace: fallen ductwork
00213	Crawlspace: fallen ductwork
00214	Crawlspace: fallen ductwork
00215	Crawlspace: fallen ductwork and pipe
00216	Crawlspace: carpentry detail, notched floor joist
00217	Crawlspace: fallen ductwork
00218	Crawlspace: out of plumb pier
00220	Crawlspace: fallen ductwork, insulation
00221	Crawlspace: fallen ductwork, insulation
00222	Crawlspace: general conditions
00224	Crawlspace: bottom of pier, note: depth; no footing; soil below
00225	Crawlspace: top of pier, note shims
00226	South wall exterior, in vicinity of strike; note damaged security light

00228	South wall, west end; note ridge line
00229	South wall, west crawlspace entryway
00230	South wall interior, first floor, in the vicinity of IMG NO. 00226; note, wall is plumb
00231	Interior intermediate wall; note balloon framing detail

- END -

APPENDIX B

Field Notes (Transposed from original hand written notes)

1st Floor Framing

6x8 girders set on 12x16 replacement pilasters (CMU)
girders approx. 9' clear span
pilaster locations not uniform

2x10 joists @ 16" o.c.

1x12 hewn plank subfloor

** all lumber true dimensional

dirt floor - very moist; organic; loamy

floor support random

some pilasters just stacked block w/ wood shims - no grout

some pilasters out of plumb

pilaster to R. of front crawl space entrance - appears to be set on dirt approx. 4" below grade

pilasters at girders are replacement CMU; wood shims below girders appear to be orig. const.

front pilaster 6' o.c.

front of house
subfloor pitched toward street
1 1/2" out of level betw. girders

rim joist, front of house - supported by vert 2x8

nothing observed to suggest direct str damage due to "strike"

no true fnd under front of house
brick & mortar fnd under rear of house (only)

HVAC

trunk main (rectangular galv. duct) collapsed
arteries insulated, wire reinforced plastic flex - collapsed

Plumbing
Potable - PVC - collapsed
Drain - PVC - collapsed

gas supply - steel pipe - collapsed

elect 0 14-2 wire (old romex) noted - flying splice (?)

Wall Framing
balloon - 2x4 (true) @ 16" o.c.
1x8 - 1x12 exterior sheathing

Ext.
strike side -
- siding lines drop toward center of house
- house sags front to back toward middle
- frost/age/fnd

crushed security light

rear gable, tall section - strange damage

visible roof sag // shingles in good condition

interior
obvious/definite floor sag
- age/support
- frost heave

cracked / broken plaster
strike wall plumb - see photo

Homeowner Comments
no heat in front bedroom after strike
floor sags in front closet after strike
doors don't shut - once did

house habitable prior to strike, but worn and in distressed condition

(roofline dwg attached)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

JONES FAMILY TRUST, SYLVIA JONES & BOBBY JONES,

Plaintiffs,

-vs-

Case No.: 13-019698-NZ-2

HON. ROBERT L. KACZMAREK

SAGINAW COUNTY LAND BANK AUTHORITY, CITY OF SAGINAW, RHODE BROS. EXCAVATING, INC., and HARDHAT DOE, an unknown employee,

Defendants.

_____/

DEPOSITION OF SYLVIA DENISE JONES

Taken by the Defendant on the 28th day of August, 2013, at 5140 State Street, Saginaw, Michigan, at 12:58 p.m.

APPEARANCES:

For the Plaintiff:

MR. PHILIP L. ELLISON (P74117)
Outside Legal Counsel, P. L. C.
P. O. Box 107
Hemlock, MI 48626
(989) 642-0055

Page 2

For the Defendant
City of Saginaw &
Rhode Bros.: MR. GREGORY W. MAIR (P67465)
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Saginaw, MI 48605
(989) 790-0960
For the Defendant
Land Bank Authority: MR. LAWRENCE WILLIAM SMITH (P27029)
Gilbert, Smith & Borrello, P. C.
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Saginaw, MI 48602
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REPORTED BY: Debra A. Shimel, CSR-4931
Certified Shorthand Reporter
(989) 793-6672 1-800-878-6672
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SYLVIA DENISE JONES
HAVING BEEN CALLED BY THE DEFENDANT AND SWORN:
EXAMINATION
BY MR. MAIR:

Q. Good afternoon. My name is Greg Mair. I represent the City of Saginaw and Rohde Brothers in this action that's been filed by the Jones Family Trust, yourself and your husband, Bobby Jones. Have you ever given deposition testimony before?
A. Yes.
Q. Okay. Approximately how many times?
A. Ah, two to three times. Three times I think.
Q. Okay. Do you remember those actions?
A. (Witness nods head.)
Q. What were those related to?
A. Um, a lawsuit with my brother. Um, the other two I can't remember right now.
Q. Okay. Do you know approximately how long ago it was that you were deposed?
A. Several years ago.
Q. More than ten?
A. Oh, I know. Ah, the one from my husband's car accident.
Q. Okay. When was that?
A. '11 or '12, 2000.

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Q. Okay. Any other times you can think that you were deposed?
A. There might be another one. I can't think right now.
Q. Okay. If it comes back to you, just let me know. I'll give you a brief overview of the ground rules here. I'm going to ask you a series of questions about the property that forms the subject matter of the lawsuit that we have here. If at any time you don't understand my question, could you, please, ask me to rephrase it?
A. Yes.
Q. And as we go through this process, you may use non-verbal communication that I correct you on. I'd just ask that you attempt the best you can to say yes or no to the questions and if I correct you, I'm not picking on you, I just want to make sure we have what your answer is on the record; is that fair?
A. Yes.
Q. And if at any time you need to take a break, just please, indicate that you want to take a break. The only thing I'd ask is that you answer any question that's left out there before we take a break; is that okay?
A. Yes.
Q. What is your full name?
A. Sylvia Denise Jones.

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Q. And is it S-Y-L-V-I-A?
A. Yes.
Q. And what's your date of birth?
A. 9-4-54.
Q. And what is your current address?
A. 351 South 5th Avenue.
Q. Is that 48601?
A. Yes.
Q. Okay. How long have you lived there?
A. A year in November.
Q. Okay. Do you remember the date that you moved in 2012?
A. I'm sorry?
Q. You moved into the 351 South 5th Avenue home in November of 2012; is that correct?
A. Yes.
Q. Do you remember the exact date?
A. No.
MR. ELLISON: And, Sylvia, just so to remind you, you answer only to what you know here today, okay? So there's no--I'm sure Greg would agree with me there's no right or wrong answer. You only give the truth as to what you actually know and can testify to here today.
Q. Prior to the 351 address, where did you live?
A. 339 South 5th Avenue.

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Q. Who owns the 351 address?
A. Ah, Jones Family Trust.
Q. Okay. Is that the same case with the 339 address?
A. Yes.
Q. How long did you live at 339?
A. 1979.
Q. Continuously until 2012?
A. Not continuously.
Q. All right. Where did you live, um, what other addresses have you lived at since 1979?
A. 1023 Carroll, C-A-R-R-O-L-L.
Q. Okay. Also in Saginaw?
A. Yes.
Q. 48601?
A. I think that's 7.
Q. Okay. When did you live at the Carroll address?
A. 2007. The end of 2007 until the beginning of 2010.
Q. Okay. What was the reason that you lived there for that time period?
A. I have a house, that house there, I had to get over there and lived in there and get it going, make sure everything was okay.
Q. So did you acquire the house in 2007?
A. No.
Q. When did you acquire that residence?

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A. 1993.
Q. All right. I guess I don't understand why you had to move there and live there in 2007. Was there any reason why you left the 339 address to move to Carroll?
MR. ELLISON: I'm going to object on relevancy grounds. Go ahead and answer, if you can.
A. Ask the question again.
Q. What was the reason that you moved from 339 South 5th Avenue to 1023 Carroll--
MR. ELLISON: Same objection.
Q. --in 2007?
THE WITNESS: I--didn't you object? Do I answer?
MR. ELLISON: Yeah, you still answer. Yep. I'm just placing an objection--I'm sorry--I'm going to place some objections on the record and it's just for the purposes of we're preserving this in case we go--if we need to utilize any of this if it goes before the judge, then we get to discuss--the lawyers work out the objections so I may object. You only don't answer when I instruct you not to answer, okay?
THE WITNESS: Okay.
MR. ELLISON: All right.
A. I felt if I moved in there, I could get better control of the house. It's a very large house.

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Q. Okay. What was the reason you moved out of there in the beginning of 2010?
A. To move back in the house to get control of it.
Q. All right. What did you need to get control of at the 339 address in 2010?
A. So nobody could break in there and...
Q. Has that been a problem at the 339 address, break-ins?
A. No.
Q. Okay. Any other reason why you moved from Carroll back to the 339 address other than to get control and prevent break-ins?
A. Say that again, the first part.
Q. My understanding is is that you moved from the 339 address to the Carroll address at the end of 2007; is that correct?
A. Right.
Q. All right. And you did that to get control of this large residence. You then lived there for approximately two and a half to three years it looks like?
A. Uh-huh.
Q. And you moved out from the Carroll address to the 339 address. I'm trying to understand why it was that you moved from Carroll back to the 339 address?
A. Let me start, I had rented it to a pastor and his wife

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and then they moved out so my--I was afraid for my husband walking down these high steps over at the 1023 address so I felt it would be better for him back at our house.
Q. Okay. How long was the 339 address rented for?
A. A year.
Q. Okay. Is that the only tenant you've had there?
A. Yes.
Q. Are you making a claim of damages in this lawsuit for loss of rent for the 339 address?
A. For the 339?
Q. Correct.
A. No.
Q. Okay. Do you still own the 1023 address?
A. Yes.
Q. And is that in the Jones Family Trust as well?
A. Yes.
Q. All right. How many properties does the Jones Family Trust own currently?
A. With houses?
Q. Yes.
A. Three.
Q. So those are the three we've talked about here today on the record?
A. Yes.

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Q. Were there any other properties that the trust had owned over the years that it no longer owns?
MR. ELLISON: I'm going to object again on relevancy grounds on any of this, but go ahead.
A. Could you repeat the question?
Q. Are there any other properties that the Jones Family Trust has owned over the years that it does not currently own?
MR. ELLISON: Same objection.
A. No.
Q. So at all times if I understand correctly the Jones Family Trust has owned three separate properties; is that correct?
A. You mean through the years? We did own one other house on that same block. Um, what was the address? Um, it was years ago. It might have been 358.
Q. Okay. How long did you own that or how long did the trust own that property?
A. The trust didn't--we didn't have the trust then come to think of it so I still don't know I guess.
Q. All right. What happened to that property, if you know?
A. It was torn down.
Q. Do you know why?
A. We let it go. It was too much work involved.

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Q. What about that property was too much work?
A. What about the house was too much work?
Q. Yeah. Like what was the problem with it?
A. It was very expensive to repair.
Q. Can you be more specific?
A. It was too expensive to repair.
Q. What specifically was too expensive to repair?
A. The entire thing. It needed a new roof.
Q. Okay. And do you know who acquired that property?
A. I'm thinking it went back to the city.
Q. All right.
MR. ELLISON: Greg, if I could. Sylvia, you just said I think. Do you know it went back to the city or are you guessing it went back to the city?
THE WITNESS: The reason I say that is because a person got it after we did. I don't know how he got it.
MR. ELLISON: Only answer what you know, not what you're guessing on here.
MR. MAIR: I just want--I mean I understand what you're trying to do. If you have anything that you need to clarify at the end of this, you're more than able to ask those questions then.
MR. ELLISON: Well, I want to make sure my client--I've heard twice now because you've been

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asking, counsel, ambiguous questions here about--
MR. MAIR: If you have an objection about my question, then make your objection, but I don't want you interrupting clarifying her testimony.
MR. ELLISON: I'm not trying to clarify. I'm just trying to make sure that she's answering only what you know here today, okay, from here forward to be clear about that. I don't want you guessing, okay?
THE WITNESS: All right.
MR. ELLISON: Okay.
MR. MAIR: And I'll just ask again that you make objections and stop interrupting her testimony and my inquiry.
MR. ELLISON: Well...
Q. When was the Jones Family Trust organized?
A. 1999. I mean 1909.
Q. 1909?
A. 2009.
Q. 2009. Do you know who the trustee is of that trust?
A. Who the trustee is?
Q. Yes.
A. Myself and my husband.
Q. Who are the beneficiaries of the trust?
A. Um, my children.
Q. How many children do you have?

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A. Five.
Q. Was are their names and ages?
A. Scotty Lorenzo Jones is 26. Michael Barrera Jones. His name is Michael Lee Barrera Jones. These are adopted children so I left his last name.
Q. How old is Michael?
A. 22.
Q. Okay.
A. He was exempted Thursday. We took him out.
Q. Oh, okay.
A. Justin Simon Jones, he's 20.
Q. Okay.
A. Le'Calvis.
Q. Can you spell that?
A. L-E' capital C-A-L-V-I-S, Mariana Jones, Maniscia.
Q. How do you spell that?
A. M-A-N-I-S-C-I-A, LeLeta, L-E-L-E-T-A, Jones.
Q. How old is Maniscia?
A. She's 13.
Q. And how old is Le'Calvis?
A. 16.
Q. Okay. Why was it that Michael was exempted last week, if you know?
A. I can't say. That's private. That's my business.
MR. ELLISON: Well, he's asking you a

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question and you're going to have to answer here. I mean we can move to seal this if we need to, but...
A. Reasons it's in the trust, ah, reasons that's personal to us.
Q. Okay. Can you be more specific, please?
A. Reasons that's personal to us.
Q. I'm asking what are those personal reasons that Michael was exempted from the Jones Family Trust?
A. He stole a lot of credit cards and used them.
Q. How much?
A. How much money?
Q. Yes.
A. Well, we haven't totalled it out, all out.
Q. Do you have an estimate?
A. 3 to $4,000. Actually it's a debit card and a credit card.
Q. Has that, um, have you filed a police report associated with that?
A. Yes. The debit and credit this last deal was my brother-in-laws.
Q. Okay. What's his name?
A. My brother-in-law?
Q. Yes.
A. Johnny.
Q. What's his last name?

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A. Jones.
Q. Do you know his address?
A. No, I don't.
Q. Do you know his phone number?
A. No, I don't.
Q. Do you know what street he lives on?
A. Iowa.
Q. All right. What other property or assets are included in the Jones Family Trust besides these three properties we've talked about?
A. Empty vacant land.
Q. How many, ah, vacant properties are there?
A. I believe it's six.
Q. Any other assets that is included in the trust?
A. Well, the--everything we own.
Q. Okay. Such as what?
A. Vehicles.
Q. Okay. How many vehicles are in the trust?
A. Two now.
Q. Are those your vehicles that you own and operate or the trust owns, but you operate?
A. Yeah.
Q. Okay.
A. Yes.
Q. Any other property?

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A. No.
Q. Do you know what the estimated value is of the trust in its entirety?
A. No.
Q. Have you ever made that calculation?
A. No.
Q. When's the last time you had the 339 South 5th Avenue address appraised?
A. Ah, I had a mortgage on it. Let me think. Um, I'm not sure if it was 2008 or '9 or '10.
Q. Do you have a copy of any of those documents from that appraisal?
A. I'm--I probably do. I might.
Q. Okay. Do you know what the amount of the appraisal was?
A. The insurance company did an appraisal, too.
Q. Okay.
A. Now, what was your question?
Q. The amount of the appraisal.
A. I'm thinking it's 265,000 I think if I remember correctly.
Q. Okay. Do you know what company did the appraisal?
A. No.
Q. Have you had any appraisals done on the 339 address after September of 2012?

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A. An appraisal, no.
Q. Yes. How far did you go in school?
A. Delta College 12 credits before I get my associate's.
Q. When did you attend Delta?
A. '73. Well, actually '72, '73 and the first part of '74.
Q. Okay. Where did you go to high school?
A. Saginaw High.
Q. What year did you graduate?
A. 1972.
Q. And did you say that all of your five children are adopted?
A. Yes.
Q. Do you have any other children?
A. No.
Q. And you're currently married to Bobby Jones; is that correct?
A. Yes.
Q. What year were you married to Bobby?
A. 1988.
Q. How long have you known him?
A. 1969.
Q. Okay. Does Bobby have any children?
A. No.
Q. Did both yourself and Bobby adopt your five children?

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A. Yes.
Q. Are you currently employed?
A. No.
Q. When was the last time you were employed?
A. 2010.
Q. And what type of employment did you have?
A. Cosmetology.
Q. Okay. So you were a cosmetologist?
A. Cosmetologist instructor.
Q. Where did you instruct at?
A. Moje.
Q. Moje?
A. Moje.
Q. Can you spell that?
A. Moje Concept? M-O' or is it M-O-J-E. Roger Gomez.
Q. Roger Gomez?
A. Uh-huh. He has In Sessions.
Q. Okay. Where was the place of instruction? Where was that located?
A. Schaefer.
Q. Schaefer Street?
A. Schaefer Street.
Q. Were you self-employed then?
A. No. What did you say?
Q. Were you self-employed at that time or what was your

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employment arrangement with Moje?
A. Student, ah, then I became an--went to instructor then I taught school there.
Q. Did you work for yourself or did you work for somebody else?
A. I worked for Roger.
Q. Okay.
A. And then I had a salon across from his.
Q. Okay. That was also on Schaefer?
A. Yes.
Q. Okay. So you operated a salon along with instructing cosmetology students; is that fair?
A. Yes.
Q. Okay. And how long did you have the salon business? Was that your business?
A. No. That was Roger's school and he had a salon upstairs.
Q. Have you ever owned your own business?
A. Yes.
Q. What business have you owned?
A. City View.
Q. When did you own City View?
A. 1986 until, um, 2010.
Q. Okay. And why is it that City View closed?
A. Ah, I had water damage.

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Q. Okay. Where was the City View? Was that a salon?
A. Yes.
Q. Where was that salon located?
A. Seals Island.
Q. Seals Island?
A. Seals Island.
Q. Okay. And was that, um, was that a building you rented or did you own it?
A. I had a perpetual lease.
Q. Okay. And what was it about the water damage that caused the business to terminate?
A. Um, ask that again.
Q. What was it about the water damage that caused the business to terminate?
A. It flooded.
Q. Okay. And it was never repaired?
A. No.
Q. Okay. Who was responsible for the repair?
MR. ELLISON: She just testified it didn't repair so...
Q. Who would have been responsible for the repair?
A. Who would have been responsible for the repair?
Q. Yes.
A. I don't know how to answer that.
Q. Well, how about I ask you this. You became aware of

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water damage at the City View Salon; is that correct?
A. Correct.
Q. All right. And you made--did you make an assessment that your repairs would be too expensive to make on that building?
A. Did I what?
Q. Did you make the determination that the repairs were too expensive on that building because of the water damage?
A. No.
Q. Okay. Do you know if anybody made that assessment?
A. I can't remember.
Q. Who was the landlord?
A. Galloway Enterprises.
Q. Do you remember an individual that you had contact with at Galloway?
A. I can't hear you.
Q. Who was your point of contact at Galloway?
A. Who was my point of contact?
Q. Yeah. The name of the person?
A. My sister and myself.
Q. So was Galloway Enterprises your company?
A. It was.
Q. Okay. What's your sister's name?
A. Deborah.

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Q. D-E-B-O-R?
A. A-H.
Q. A-H. What's her last name?
A. Jones.
Q. Okay. Do you know her phone number?
A. She's passed.
Q. Do you know when?
A. 2011.
Q. So if I understand correctly, would Galloway Enterprises have been responsible for repairing the damage at the City View Salon where the City View Salon was located?
A. I'm not sure how that would have come out, who would have been responsible.
Q. Okay. Do you know who made the decision not to repair the salon?
A. No. I don't remember.
Q. Do you remember how much the repair would have cost?
A. No, I don't.
Q. Did you relocate City View to any other location?
A. Not yet.
Q. Is Galloway Enterprises still in business?
A. I haven't decided.
Q. How is Galloway Enterprises organized? Is it a corporation, LLC, d/b/a?

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A. It was an LLC.
Q. All right.
A. It, ah, everybody has passed but myself.
Q. Who else was, ah, is part of that business?
A. Two brothers and my sister.
Q. So Deborah and two brothers and you; is that correct?
A. Correct.
Q. Four total members?
A. Well, we had a silent partner.
Q. Who was that?
A. My aunt.
Q. What's her name?
A. Willett Johnson.
Q. Where does she live?
A. Magnum Care.
Q. Where is that located?
A. I'm not sure. It's on Center.
Q. Is that like a nursing home?
A. Yes.
Q. Do you know if Galloway Enterprises is still active and in good standing with the state of Michigan?
A. Yes.
Q. Who is responsible for making those filings?
A. Who is responsible for making the filings?
Q. Yes.

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A. It would be me now.
Q. Okay. And have you done that for 2013?
A. No, I haven't decided if I was going to keep the name or change it. I haven't decided yet.
Q. Well, when is the last time you made any filings with respect to Galloway Enterprises?
A. I don't remember.
Q. Do you have any interest in any other businesses organized here in the state of Michigan?
A. No.
Q. Do you operate any rental properties currently?
A. No.
Q. When is the last time you operated rental properties?
A. I don't remember.
Q. Do you know what the rental amount was for the 339 address for the one year when you rented it to the pastor?
A. $800 a month.
Q. Any other, um, were you exclusively employed with City View or by City View from '86 to 2010 or did you have any other jobs?
A. Could you repeat that.
Q. Sure. I was looking at your employment history and I have here that you were employed by City View or you operated City View from 1986 to 2010. Was that your

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only source of employment during that period of time?
A. Yes.
Q. Okay. What income do you currently receive on a monthly basis?
A. None.
Q. Do you know of any income that your husband receives?
A. Ah, disability, and, um, pension.
Q. Do you know what amounts those are?
A. Do I know what amounts they are?
Q. Yes.
A. I would have to check.
Q. Okay. Do you know if your property taxes are current on any of the properties that are owned by the Jones Family Trust?
A. Are they current?
Q. Yes.
A. They—no, they're not current.
Q. All right.
A. Not all of them.
Q. Which ones are current?
A. About six of them.
Q. Okay. Which six are current?
A. I'm not sure.
Q. Are those the vacant properties—
A. Most.

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Q. --or are those the ones that have a physical structure on them?
A. I--I can't remember.
Q. Okay. Are the taxes current at 351 South 5th Avenue?
A. What do you mean current?
Q. Are they paid up? Do you owe any property taxes at those addresses?
A. They're not paid up.
Q. Okay. Do you know how much is owed at 351 South 5th Avenue?
A. I can't remember.
Q. Okay. Do you know the last time taxes were paid at 351 South 5th Avenue?
A. Last year.
Q. Okay. Do you know in what amount?
A. I can't remember.
Q. Okay. All right. How about at 339 South 5th Avenue?
A. I can't remember whether paying or owing.
Q. Do you know how much is owed?
A. Not the exact figure.
Q. Do you have an estimated figure?
A. No. I don't want to guess. I can't guess.
Q. Do you know for which years--I'm sorry?
A. I said I can't guess.
Q. Okay. Do you know for which property taxes are owed on

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the 339 address?
A. I can't remember.
Q. Do you remember the last time you paid property taxes at the 339 address?
A. May.
Q. Of?
A. This year.
Q. So you last paid property taxes in May of 2013 for 339 South 5th Avenue; is that correct?
A. Yes.
Q. Okay. And do you know for what tax year that was applicable to?
A. No.
Q. Do you know what amount that was?
A. I can't remember.
Q. Okay. Do you know if either the 351 or 339 address are currently in foreclosure for failure to pay property taxes?
A. I can't--I don't understand.
Q. Do you understand that if you do not pay property taxes, your property could be in foreclosure; do you understand that concept?
A. Yes.
Q. Are either of those addresses in foreclosure for failure to pay property taxes?

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A. I can't remember.
Q. Have either of those addresses ever been in foreclosure for failure to pay property taxes?
A. 339 some years it has been off and on and I always paid them.
Q. When you say off and on, can you give me an idea of how many times the property, and let's just talk about 339, how many times has that property been in foreclosure for failure to pay taxes?
A. I can't remember.
Q. Has it been more than five times?
A. I can't remember.
Q. You have no idea?
A. I don't want to guess.
Q. Okay. Has it been one time?
A. Possibly.
Q. You don't know?
A. I can't remember. I have a lot of properties. I don't want to guess.
Q. So as you sit here right now you have no idea if 339 South 5th Avenue has ever been in tax foreclosure?
A. Well, 339 is under arrangements now for back taxes.
Q. All right. So you know of at least one occasion where arrangements had to be made with the 339 address to pay back property taxes; is that correct?

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A. That's correct.
Q. Okay. And was that as a result of a tax foreclosure proceeding, if you know?
A. If that was what?
Q. What arrangement do you have currently with the 339 address?
A. To pay it up in a year.
Q. Okay. Do you know what amount?
A. I can't--I don't want to guess.
Q. You have no idea?
A. I don't want to guess. I have some idea, but I don't want to guess.
Q. What is your general idea of what the amount is?
A. 2100.
Q. And that's due by when?
A. April 1st.
Q. Do you intend to pay that money--
A. I am going to pay that money.
Q. Okay. Is that the only time that you've had to make an arrangement to pay back property taxes for the 339 address?
A. Several years ago and we, ah, several years ago.
Q. Do you know in what amount?
A. For?
Q. 4,000?

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A. For which properties?
Q. Oh, I'm sorry. I was talking about the 339 address and asking were there any other circumstances where you had to make arrangements to pay back property taxes to either the city or the county?
A. I cannot remember because we have so many and we've made arrangements through the years and the reason I don't know the prices because we paid in a bulk like one check like $10,000, 8,000, whatever it was we just paid it.
MR. ELLISON: Do you want to take a break at all?
THE WITNESS: Not really.
MR. ELLISON: Okay. All right.
(Dep.X#1 marked.)
THE WITNESS: Can I talk to you?
MR. ELLISON: Sure. We're going to take a break--if we can take a break for a second here?
MR. MAIR: Yep.
MR. ELLISON: All right. Let's step outside here.
(Off the record at 1:36 p.m.)
(Back on the record at 1:39 p.m.)
Q. I've marked Exhibit Number 1 and I'll just describe that for the record for you. That's the responses that

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I received to the interrogatories that I had previously submitted to your counsel. Do you recognize that document just in general?
A. I'm not sure at this time.
Q. Okay. If you could flip to the last page. Is that your signature the first two lines?
A. It sure is.
Q. Okay. Now, as you sit here today, do you recall the date of the incident involving the demolition of the house next door?
A. No, I don't. Not at this time.
Q. Okay. You don't--you don't know the specific date?
A. No, because I was in shock.
Q. Okay. Do you know the month?
A. September.
Q. All right. Do you remember the day of the week?
A. The day of the week?
Q. Yes. Was it a weekend or was it during the week?
A. It was during the week because my grandkids that's the reason I--it was during the week.
Q. How many grandkids do you have?
A. Seven and a half.
Q. How do you have seven and a half grandkids?
A. I got a pregnant daughter-in-law.
Q. Okay. How many of your grandkids were at the house on

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the date of the impact?
A. The day of the impact?
Q. Uh-huh.
A. Five.
Q. What were their age ranges last September, 2012 as young as and as old as?
A. I shouldn't have said all grandkids. My two kids so three.
Q. So you had your two children who are in their teens; is that correct?
A. Yes.
Q. All right. And then you had three grandkids. What were their age ranges?
A. Ah, six, five and two.
Q. Okay. Do you recall the time of day that the impact happened?
A. It had to be, ah, I think it was 8:06.
Q. 8:06?
A. Uh-huh.
Q. In the morning or in the evening?
A. A.m.
Q. Okay. And where were you at 8:06 a.m.?
A. Across the street on my neighbor's porch. And can I verify something?
Q. You sure can.

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A. You said how many kids were there the day of the impact not the time, right, because--
Q. How many were there at the time of the impact?
A. At the time of the impact, one.
Q. Which one?
A. The two year old.
Q. Where were the others?
A. On their way to school.
Q. Before 8:06 a.m., how long were you at your neighbor's house on the porch?
A. I'm sorry?
Q. How long were you on your neighbor's porch before the impact happened approximately?
A. 15 minutes, 10 minutes.
Q. 10 to 15?
A. 15 minutes.
Q. Okay. And why were you there?
A. Um, watching, um, the, um, house get torn down.
Q. Okay. And what is the neighbor's name?
A. Um, Mr. and Mrs. McKnight.
Q. Do you know their first names?
A. Lillie and, um, we call him Mr. McKnight. Mr. McKnight. I can't even think of his first name.
Q. That's okay.
A. I never called him by his first name.

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Q. Do you consider them friends?
A. They're my husband's friends.
Q. Okay. At the time of the impact was there anybody inside the 339 address?
A. Yes.
Q. Who?
A. My husband, um, Scotty, Junior my two year old grandson. He's three now. Um, and my son Justin.
Q. You said Justin?
A. Justin Simon Jones.
Q. So four people were inside the house, correct?
A. Three.
MR. ELLISON: I'm only counting three.
Q. I have Bobby, Scotty, Junior, the two year old grandson and Justin?.
A. Scotty the two year old is the same person.
Q. Ah. Okay.
A. I'm trying to think was he two. His birthday was in November.
Q. That's not important.
A. Oh.
Q. That's okay. It's close enough.
A. I think he was three.
Q. Okay. What did you do after the--did you see the impact?

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A. Yes, I did.
Q. What did you do after?
A. I froze.
Q. Okay.
A. Screamed, cried.
Q. Okay. Anything else?
A. I took pictures.
Q. Immediately after?
A. Yep.
Q. Did you have a camera on you at the McKnight residence?
A. Yes, I did.
Q. Okay. What camera did you have on you?
A. What camera?
Q. Yeah. What type of camera did you have?
A. I don't remember the name of it. It might have been a Walgreen special or--
Q. Okay. Like a disposable camera?
A. Yeah. Yes.
Q. Was there any particular reason you had a camera on you at the McKnight residence?
A. I went and got it.
Q. Okay. So just so I understand the time line, impact happens, you go and get the camera from where?
A. No. I went and got it from the house.
Q. Okay. Your house?

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A. My house.
Q. Okay. So you see the impact on the porch?
A. No.
Q. Where do you see the impact, from where?
A. The McKnight's house. I had the camera with me. I went and got it before.
Q. Why did you go and get it before?
A. I didn't like the way they pulled up and got so busy and was wetting the house down. It didn't look good to me.
Q. Can you explain what about their behavior did not look good to you?
A. Can I explain?
Q. Yeah. What were they doing that did not look good to you?
A. They looked careless.
Q. Did you talk to anybody before the impact? Did you tell anybody as part of the demolition crew that they looked careless or you were concerned?
A. I called Dick Rohde.
Q. Before the impact?
A. Yes, I did.
Q. Do you know what time?
A. It had to be 7:00, 7:15.
Q. Did you talk to him?

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A. Yes.
Q. What did you tell him?
A. Why did he send these clowns out here to my house. They looked very inexperienced and he needs to get out here and look at them.
Q. What was his response?
A. He came over.
Q. Before the impact?
A. I'm trying to think was it before. Well, he--he--I don't--I don't think it was before. I don't remember.
Q. Are you certain that you called him before the impact?
A. Yep.
Q. Are you certain you talked to him before the impact?
A. I think I did. I'm sure I did.
Q. Are you--do you have a recollection if he was present at the property before the impact and he being Dick Rohde?
A. I'm not sure.
Q. Before September of 2012, did you know who Dick Rohde was?
A. No. Well, I know Rohde Brothers.
Q. Well, you said you called Dick Rohde. How did you know to call Dick Rohde specifically?
A. His supervisor or whoever was supervising gave me the number.

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Q. Do you know who the supervisor was?
A. No.
Q. Did you ask the supervisor for the number?
A. I asked a couple of them out there.
Q. How many were out there?
A. How many? Ah,–
Q. Rohde workers as far as you understood.
A. I'm thinking. If I remember correctly, four, three or four.
Q. Do you know what time they arrived?
A. About 7:30, 7:00, between 7:00 and 7:30.
Q. Okay. And how was it that you talked to the supervisor or knew that that was the supervisor you talked to?
A. I asked who was in charge.
Q. Okay. And did they–was someone–did you ask the supervisor who was in charge or did somebody point out that is the supervisor in charge?
A. I'm not sure of the scenario how it went, if the supervisor come after I called Mr. Rohde or before, but I asked right away who was in charge and they gave me the number to call Mr. Rohde's office.
Q. Okay. Did you have any conversation with any of the three to four people on site before the impact?
A. Yeah, I guess I did.
Q. And what was that conversation about?

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A. It started out about a fence in between the houses.
Q. Okay. Tell me about that?
A. I talked to one of the workers and asked him to–not to–could they spare my–that fence was mine in between the houses.
Q. Okay. And what was their response?
A. To–from who, me or the worker?
Q. Well, I'm trying to follow the chain of the conversation. You addressed one of the workers asking to spare the fence?
A. Uh-huh.
Q. What was the response by the worker to you?
A. He must not have heard me.
Q. Okay. So my understanding there was no response?
A. That was my understanding.
Q. Okay. Then what did you do after that?
A. I went back across the street. No, that's when I think I went and got the camera. I think that's when I went and got the camera.
Q. Okay. Before the impact, did you have any other conversation or attempt to have any other conversation with any other Rohde worker at the property next door?
A. No. I went across the street.
Q. The McKnight residence is that directly across the street from the 339 address?

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A. It's like a–oh, 339?
Q. Yes.
A. Well, it's still like a catacomb. It's not, no.
Q. Is it directly across the street from the house that was being demolished?
A. Yes, it was right in front.
Q. As you were looking at it, at the two houses, the demolished house and the 339 address, was that to the right or left of your vantage point from the porch looking at those houses?
A. Like I'm looking at you.
Q. Yes.
A. Like I'm looking at you.
Q. Correct. Which side? Straight ahead?
A. Straight ahead.
Q. Okay. Right in the middle?
A. Yes.
Q. Okay. Can you estimate how long the demolition was going before the impact happened on to your house?
A. Minutes. It, um, it was quick. It was–it seemed like it was longer, but it was–it was just minutes, seconds, minutes. Minutes not seconds.
Q. Less than ten minutes after they started demolishing the house the piece hit your house; is that your estimate?

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A. 10 to 15.
Q. Okay. All right. After you saw the impact, what did you do?
A. Panicked.
Q. Okay. After you panicked, what did you do?
A. Screamed.
Q. Okay. After you screamed, what did you do?
A. I'm trying to think. I think I called Rohde Brother again.
Q. All right. Were you at the McKnight residence on the porch still when you called Rohde Brothers?
A. I think I was in my car because I couldn't–I was so shook up I, um, I ran home first. Let me think. Um, I can't remember.
Q. Okay. Do you recall at some point being in your vehicle?
A. Do I recall?
Q. Do you recall at some point being in your–
A. Yeah. The car–my car was in the McKnight's driveway.
Q. Okay. And why was it that you got into your car, if you know?
A. Well, I drove my car from where I–it was parked in my driveway and backed it into there.
Q. Sure. Did you make any phone calls while in your car?
A. Yes.

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Q. What did you--did you use a cell phone to make those calls?
A. Yes.
Q. Do you have any of those cell phone records showing the phone calls that you made on the date of the impact?
A. No, I didn't. Why, you know, would I have that?
Q. Okay. Do you have the same cell phone number now that you did then?
A. I don't think so.
Q. Do you remember what cell phone number you had back in September of 2012?
A. I'd have to get it. I think we changed home and cell after we moved.
Q. Okay. Do you remember what phone calls you made about the impact after the impact happened?
A. Do I remember what phone calls I made?
Q. Yes. You made one to Dick Rohde; is that correct?
A. I'm believing that's when I made it because time went so fast.
Q. I understand.
A. I got to remember the before and after and in between so I can't get them all together right now.
Q. Okay. Do you know about what time you called Dick Rohde after the impact?
A. What time?

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Q. Yes.
A. No.
Q. Okay. Do you have any idea how long the impact took in terms of seeing the piece of roof slide off and then striking the home? Do you know how long that took?
A. The roof didn't slide off. The whole house hit the--my house.
Q. Let's do it this way. Tell me what you saw in terms of the demolish--the house being demolished and what struck the house, your house, tell me what you saw?
A. Say it again.
Q. While you were on the McKnight--my understanding is you witnessed the house that was being demolished a piece or something come off of that house and hit your residence; is that fair?
A. Right.
Q. Okay. Tell me what you saw?
A. I saw the house, the roof and the side hit my house.
Q. Okay. Do you know approximately how big the piece was?
A. Pieces.
Q. Okay.
A. Several pieces.
Q. Several pieces hit your house?
A. Yeah. They were large, um, like, ah, four by fours, but they were larger than four by fours.

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Q. Okay.
A. Because it was, ah, layers and layers of shingles and there was a lot of lot of dust so I didn't see--it wasn't like it was a clean. After the hit, dust and mold and algae and everything else was everywhere. It was a big smoke cloud.
Q. Okay. Was it one impact or were there several impacts as far as you witnessed?
A. Well, when we slowed it down, it was like several boom, boom, boom, boom.
Q. What do you mean when we slowed it down?
A. When I slowed it down.
Q. Slowed what down?
A. The memory of it.
Q. Okay. And when you did that thinking back--
A. Uh-huh.
Q. --it was several impacts?
A. Yeah, because you could see it when it was--hit, the dust was flying.
Q. Okay. How many times, how many different impacts?
A. I would say about three, three to four, that's why I said it was more than just the roof. It was the side of the building also.
Q. Have you watched the surveillance footage that you provided to your counsel?

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A. Have I watched it?
Q. Yeah. Have you watched that footage?
A. Yeah.
Q. Okay. Does that footage depict more than one impact on the side of your house as far as you understand?
A. Does it depict more than one?
Q. Yes.
A. If you slow it--if you slow it down or bring it off, you can see how it comes off. You can see it better coming off than you can going on.
Q. You can see what better coming off than you can going on?
A. The debris.
Q. Do you mean putting it in reverse, the video?
A. Yes.
Q. Okay. And does that video as far as you understand depict more than one impact?
A. Yes.
Q. How many does that video depict?
A. You got me confused.
Q. Do you not understand my question?
A. No, I don't.
Q. How many different impacts of debris on to your residence come from the demolished residence on the surveillance video that you have?

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MR. ELLISON: I'm going to object. The video speaks for itself. Answer, if you can.
A. I agree, too.
Q. You can't agree. You have to answer my question.
A. Um, I don't understand what you're asking me.
Q. All right. How many different impacts are shown on the surveillance video that you provided your counsel?
A. From the same debris?
Q. Sure.
A. I'm not sure. I'm saying three. I'm saying--the reason I'm saying it is the way the timber came down on the building, on my building, um, it looked like three to me. I mean the way that--it wasn't like boom. It was boom, boom, boom, boom, boom. It might have been four.
Q. Okay. Do you know is there any other video that depicts any other impact other than what you've provided to your counsel?
A. Is there any other video?
Q. Yes.
A. From where?
Q. From that surveillance footage that you had.
A. I don't understand the question.
Q. Okay. Let me ask you this way.
A. Okay.

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Q. You had surveillance footage in September of 2012 at your property in between the two properties, correct?
A. You said I had it put in or--
Q. It was there?
A. Yes.
Q. And it was functional, correct?
A. Yes.
Q. All right. And do you know who secured the video that was provided to your attorney?
A. Who secured it?
Q. Yes.
A. I don't understand what you mean.
Q. Who took the video--do you have a DVR, is that what the surveillance footage shows?
A. Yeah.
Q. Okay. Who accessed the DVR and removed the footage that shows the impact?
A. I had two, um, ah, professionals do it. My son and my nephew did it.
Q. In addition to the two professionals or your son and nephew are the two professionals?
A. There's four different people.
Q. All right. Do you still have the DVR that shows the surveillance footage from that day?
A. Yeah.

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Q. Okay. Do you have any other video besides the roughly 30 second clip that I've been provided?
A. I'm not sure--
Q. Okay.
A. --how much more.
MR. ELLISON: Can we go off the record a second?
MR. MAIR: Sure.
MR. ELLISON: Off the record.
(Discussion off the record.)
Q. Do you know when you received on a disc or whatever footage of the impact, the actual video?
A. When I received it?
Q. Yeah. Do you know when you received it?
A. When we started looking at it?
Q. Yeah.
A. Right after it happened.
Q. Okay. How did you look at the footage right after it happened, do you know?
A. Rewind the tape.
Q. From the DVR?
A. Yeah.
Q. Okay. Do you know how the video went from the DVR to a disc? Do you know how that happened?
A. I took it to a professional.

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Q. Where did you take it?
A. Ah, Computer Guy.
Q. Is that the name of the business?
A. That's his name.
Q. All right. And when you took it to a professional, what did you receive back from that professional?
A. The disc.
Q. Okay. And what did that disc have on it; can you describe it?
A. The impact of the--the building collapsing on to my building.
Q. Okay. Any other footage from that day that was on that disc, I'm talking the disc that you received from Computer Guy?
A. I'm thinking that's all. We looked at it so many times I think that's all I was interested in.
Q. How long was that footage on that disc in your best estimation?
A. Not very long. Eight, um, I can't even say eight minutes. Eight minutes, nine minutes. I'm not sure.
Q. The disc that you have--
A. It wasn't--it wasn't long at all. It started at 8:06.
Q. Okay. And ended when?
A. It may have been 8:16. I'm not sure if we stopped it at 8:16.

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MR. MAIR: Do you know where that disc is?
MR. ELLISON: I've never been given that. The--what I got was--can we go off the record?
MR. MAIER: Yeah.
(Discussion off the record.)
Q. The flash drive that you received back from whatever expert you used, is that eight minutes long?
A. I'm not sure.
Q. Okay.
A. I know it's not very long. It just shows the impact of the building, the debris, and them starting to clean--trying to get it clean, get it off the building.
MR. MAIR: The only thing I have is less than a minute.
MR. ELLISON: That's all I have, too.
Q. All right. Where is--
A. I'm not sure of the time because, see, we were looking at it on the tape and I don't want to get myself confused what was actually captured on those, um,--
Q. Do you know if all the surveillance has been preserved anywhere more than what was provided to me?
A. Ah, probably on my laptop.
Q. Okay. What is on your laptop?
A. I'm not sure. We have to look at it.
Q. Can you provide that to your attorney to figure out

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what is there if there's anything different?
A. Yeah.
Q. Is the information stored anywhere else?
A. Um, in my son's phone.
Q. Okay. Which son?
A. Michael.
Q. Does Michael live with you?
A. No.
Q. Who currently lives with you?
A. My girls and my husband.
Q. Okay.
A. And my grandkids most of the time it seem like.
Q. After the impact, did you talk to any of the Rohde workers on site?
A. Yeah.
Q. Okay. And what was that conversation about?
A. How careless could they be and why would they approach the house like they did.
Q. What was their response?
A. They weren't--they had ear plugs on. All that talking I was doing they wasn't hearing nothing.
Q. They never responded to you?
A. Well, the backhoe driver did.
Q. What did he say?
A. He said he never done nothing like that in 37 years.

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He don't know what happened.
Q. Okay.
A. And could I forgive him and...
Q. How soon after 8:06 did that conversation take place?
A. I don't know. Like I said time was moving so fast it seemed like it was a long time, but it wasn't. Maybe 10 minutes after I--after I got myself together to be able to walk.
Q. What damage did you observe on the outside of the house within that 10 minutes?
A. In the building there's scratches. My light from where the upper part hit and it slid down across my outdoor light.
Q. Okay. And any other exterior damage that you observed immediately after the impact?
A. I'm sorry?
Q. Any other exterior damage that you observed immediately after the impact? Those scratches would have been on the siding; is that correct?
A. Right. The framing around the window.
Q. What about that?
A. It was all torn apart.
Q. Do you have pictures of that?
A. Uh-huh. Yeah. Yes.
Q. Any other exterior damage that you observed?

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A. Um, the bulging under my window it looks like a--it ballooned out up under my bedroom window.
Q. Was the bedroom window on the side that was impacted?
A. Sort of. Um, it's like a curve. Ah, this is the side of the house and my window is like this.
Q. Okay. Do you know about what time you met with Mr. Rohde at your property?
A. Like I said time was--I felt like I was in space somewhere. He came right out though. He came right out. Ah, like I'm saying minutes, it could have been seconds, let me see, after the first call. He came right out after the second call.
Q. All right. And what did he tell you?
A. That he was sorry.
Q. Okay. Did you tell him what needed to be repaired specifically?
A. I didn't know what needed to be repaired specifically.
Q. Okay. So the answer to my question is what?
A. What is your question?
Q. Did you tell him what needed to be specifically repaired?
A. No.
Q. Okay. Did he talk to you about any repairs that needed to be made based on his observations?
A. He didn't.

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Q. He did not?
A. No.
Q. Okay. Did anybody talk to you about what needed to be repaired?
A. Well, they told me to check that, um, no, that was the second day. Um, the first day no. We knew the light needed repairing. It was squashed.
Q. Anything else?
A. I can't remember anything else that first day.
Q. Okay.
A. I know Mr. Rohde said he would do anything possible to--whatever needed to be fixed or whatever needed to be done, he would be glad to repair it whatever it cost and I thought that was real noble of him.
Q. Okay. And that was on the day of the impact?
A. Yes, it was.
Q. Okay. Did you have any discussion about what generally needed to be repaired on that date?
A. No. What generally needed to be repaired?
Q. Sure.
A. I can't remember if it was the same day.
Q. Okay.
A. I don't think it was the same day we discussed that.
Q. All right. Did you do anything else on the day of the impact as it relates to clean up or take pictures, have

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estimates, any notes or writings or anything that you did on that day to document what happened?
A. I took pictures.
Q. Okay.
A. I told you I took pictures.
Q. Anything else?
A. Um, I--I write a lot so I'm trying to remember did I write anything. Um, I don't think I wrote down anything but numbers, who was involved, um, that it was Mr. Rohde Brother and stuff like the company and the truck that came in between the houses.
Q. What about that?
A. They brought a double wide truck in after the impact and then after they tore down the back of the house, it went in the truck and still hit my house.
Q. So there was another impact after the truck was in there?
A. Not like the first one.
Q. And that wasn't my question. There was another impact after the first one?
A. A slight one.
Q. What time did that happen?
A. I'm not sure.
Q. Are you making a claim of any additional damage as a result of that impact as part of this lawsuit?

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A. No. The first one did enough.
Q. Okay. Do you know what time the second impact took place?
A. No.
Q. Did you witness it?
A. Yeah.
Q. Where were you located when you witnessed that impact?
A. Across the street.
Q. Do you know what time that took place?
A. No. Like I said those minutes, those seconds looked like minutes and minutes seemed like hours. It was like you said, it probably wasn't even an hour worth of time, but it seemed like all of that was stretched out, but it really wasn't.
Q. Okay. Do you know where your husband was located in the house at the time of the impact?
A. He was in the bedroom with my grandson.
Q. Which bedroom?
A. The master bedroom. On the--
Q. Go ahead.
A. The side that got hit.
Q. Okay. Was there any visible damage in the master bedroom?
A. Just it looks like it's bowed. It looks to me like it's not flat no more.

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Q. Who did you contact on the day of the impact to come and take a look at it or estimate any damage?
A. Estimate any damage that day, I don't--I don't remember calling nobody.
Q. All right. When was the first time that you contacted somebody to estimate the damage?
A. I don't remember. I can't recall right now. I have to think about it.
Q. Do you know who you contacted?
A. Ah, the very first person--
Q. Yes.
A. --to estimate damages, I can't remember who it was so many people involved that, and, um,--
Q. Well, why don't I ask you this way. What people were involved after the impact?
A. I can't think of it. It's Mr. Rohde's friend. I didn't realize that--
Q. Is that Tom Gerken?
A. Who?
Q. Tom Gerken.
A. He's a contractor?
Q. Do you remember that name?
A. It sounds familiar.
Q. Okay.
A. Ah, this guy, ah, I didn't realize that the electricity

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to the light was still on. The light was damaged and crushed and I didn't realize it was still on and he--he saw it.
Q. Saw what?
A. That the light was still on and it was burning the house so he disconnected it for me.
Q. This is Rohde's friend?
A. Yes. I don't know his name. I can't think of his name.
Q. Okay. Who else was involved?
A. Involved as me calling them?
Q. I'm using your words trying to figure out what--who you contacted after the impact to do anything with respect to your home?
A. You're using my words?
Q. I'm going off the words you used in one of your answers about the individuals involved. What individuals were involved after the impact?
A. Well, mostly Mr. Rohde's people.
Q. Okay. Who do you remember from Mr. Rohde's people that were there?
A. I don't remember any names.
Q. Okay. Do you remember how many?
A. Mr. Rohde and there was another guy there.
Q. Okay. Anyone else?

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A. Um, I have to think about this because like I said I was--
Q. Take your time.
A. Yeah. I was in a daze. I was so glad to see my grandson and husband still alive because I didn't know until the dust cleared that it didn't go through my house.
Q. Okay.
A. So I--I went--I was out of it the first day so when you say first or second day, I have to really think about it.
Q. Sure. Take your time.
A. I'm still thinking.
Q. Okay. Well, take your time.
A. Well, you won't get an answer today. Like I said maybe--
Q. Well, today is the day for me to understand what--what you remember from that day and if you don't remember anything--
A. I told you, I'm telling you what I remember. I'm telling you I don't know these people's names, who they belonged to. A lot of them were, what do you call them, gawkers. I don't know. A lot of them took off. There was one man that was there, he took off, and we were talking before the--when he took the porch down,

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but--and when the actual impact, that guy took off. I don't even know him.
Q. Was he part of Rohde Brothers or--
A. I'm not sure. I think he was just looking around the neighborhood from what he told me.
Q. Okay. Did you seek out anybody to come to the property to help estimate damage, make any repairs, do anything of that nature?
A. From that--
MR. ELLISON: You're talking about ever or just that day?
Q. I guess I'll go ever since I can't get an answer on the day of.
A. I can't understand what you're saying. You're saying that day or what days after?
Q. All I'm trying to understand is who came to your property to repair, to estimate, to look at it, anything, who came to your property?
A. Since the impact until this day?
Q. I don't know anybody that would come there before, but after the impact, yes, to today's date who has been at your property?
A. There's several people. I got a list of people if that's--I got cards. I don't remember, um,--
Q. Where is that information?

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A. Not with me. I've got different contractors I called.
Q. And you said you have this information?
A. And, um, my attorney has I guess got information. I don't know.
MR. MAIR: Do you have it?
MR. ELLISON: I don't have anything like that. I mean I don't have all these business cards or anything like that.
THE WITNESS: Yeah, I got business cards. I don't remember these people.
Q. Do you remember any of them? Do you remember one name of somebody that came out to your house?
A. Brown.
Q. Okay. Who is Brown?
A. A contractor.
Q. All right. When did he come to your house?
A. About a month or two ago.
Q. Okay. For what?
A. I was asking him questions about the--my house being saved or let go. Um, there were the two, um, people, um, can I talk with my attorney, please?
Q. After you answer my question.
A. Okay.
Q. I want to know the identities of anyone that--
A. Identities?

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Q. Yeah. The name, what you talked about.
A. I had two people, ah,–
Q. Let's go back to Brown. Do you have a first name or is that a last name? How did you come in contact with this person.
A. They were redoing houses on, um, Genesee. They were refurbishing houses. I had two inspectors.
Q. Let's stick with Brown and then we'll go to inspectors.
A. All right. All right.
Q. All right. How was it you had contact with Brown?
A. I called his number on his, um, logo.
Q. All right. Do you know what the logo said?
A. Renovations.
Q. That's all it said is renovations?
A. That's all that stuck with me.
Q. All right. And do you remember the number?
A. No, I don't.
Q. Do you have it written down anywhere?
A. I've got his card.
Q. Okay. And where is that located?
A. Ah, probably in my purse.
Q. Okay. Can you see if you have it?
A. Are you going to wait on me to find it?
Q. What's that?
A. I said are you going to wait on me to find it.

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Q. Yep. You can take your time.
A. I don't want to take too long. I've got a lot of cards. I think these are contractors.
MR. MAIR: We can go off the record, Debbie.
(Discussion off the record.)
Q. All right. We've taken a moment for you to look through your purse to see if you could find the card for this individual and–
A. I can't find it.
Q. Okay. Can you remember any individual that you had at your property from September of '12 until today's date August, 2013 that has been at your property to estimate the damages, to do any repairs, to give you any idea of feasibility for repair or what it would cost or what needs to be done, has that taken place?
A. I had two inspectors go to my house.
Q. Who are the inspectors?
A. I can't remember their names.
Q. Okay. Did you contact them?
A. Sort of, kind of. Yes.
Q. Well, what's your answer?
A. Yes.
Q. Okay. How did you contact them?
A. Through my attorney.

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Q. Are you–you had your attorney contact these people?
A. Yeah.
MR. ELLISON: Can we go off the record again for a second.
(Discussion off the record.)
Q. Any other individuals that have been at your property that you can think of besides two inspectors that were either arranged by or contacted by or through your attorney?
A. I'm not trying to, ah, it's not that I have memory loss or anything, but I talked to several, several people mostly keeping their cards. Ah, the other–I have that little pouch there I have doctors and those contractors in there and when me and my daughter was going through them the other day, I must have left the contractors out so I cannot remember all those people names.
Q. Can you remember one?
A. The, um, Mr. Brown.
Q. Any others?
A. Mr. Whitfield, Reverend Whitfield.
Q. What's the first name?
A. Reverend, that's not his first name.
Q. Sure. Reverend Whitfield?
A. Whitfield.
Q. W-H-I-T-F-I–

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A. F-I-E-L-D.
Q. How do you know Reverend Whitfield?
A. He came over and was telling me how the, um, my house foundation was gone.
Q. When did he do this?
A. That was about a–probably before Halloween just before we moved out.
Q. Anyone else?
A. Um, Silas Brazil.
Q. How do you spell the last name?
A. B-R-A-Z-I-L.
Q. Okay.
A. There's two other main ones. I know they're finishing up a building on Bay Road. I can't remember. I just got their cards and, um,...
Q. Do you have any other contractors' cards in your purse?
A. Right now?
Q. Yes.
A. I didn't see one, and I don't want to hold this up going through all that stuff. That's a lot of stuff.
Q. Why don't we take a break and you can go through it real quick.
A. I don't think it's in there I told you. I think it, when I was looking through them with my daughter–
Q. All right. Why don't we take a few more minutes and

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you can go through it. We'll take a break.
A. I would have to go home. I told you I took them out.
Q. So you have nothing in your purse?
A. I have mostly physician cards in here.
Q. Okay.
A. And they--they should not be that separated.
Q. Why don't you--why don't we take a break and you can give them to your attorney, he can look through them and then we'll go from there.
A. Give him what?
Q. The stack of cards that you have.
A. Okay.
(Off the record at 2:31 p.m.)
(Back on the record at 2:47 p.m.)
Q. Has there ever been an occasion, any occasion, where you've denied anyone entry to your property to look at the interior damage?
A. No.
Q. Did you think of any other contractors that have been to your property while you were off on break?
A. Yes.
Q. Okay. And do you have a list of those?
A. There's more than this, but I got these.
Q. Okay. Let me take a look at those.
A. Gohm was one of the first ones.

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Q. Okay. This Spaulding township is that Brown?
A. Yes. Then I got a book that I've got a lot of--Mr. Whitfield, ah, Reverend Whitfield, I don't know his first name.
Q. Okay. What kind of book do you have?
A. Just a--a planner.
Q. What's in there?
A. More contractors.
Q. All right. I'm going to send your attorney a request for that so just be on the look out for that I guess.
A. You'll be on the look out to get what?
Q. The planner.
A. The names?
Q. Yes.
A. Out of the planner?
Q. Yep. I'm going to send him a request for that just so we can clear it up.
A. Well, like I said Mr. Whitfield and, ah, what else?
Q. All right. You mentioned earlier that you had a mortgage on the 339 address?
A. Correct.
Q. Do you know when that mortgage was paid off or has it been paid off?
A. 2010. 2009, 2010.
Q. Okay. And do you know what the amount of that mortgage

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was?
A. I can't remember because it was two, the first and second mortgage.
Q. Okay. Did you carry home owners insurance on the 339 address in September of 2012?
A. No, I didn't.
Q. When was the last time you had home owners insurance?
A. Prior to that, I had it written up in August, but I had surgery and I didn't pay the premium.
Q. Written up in August of 2012?
A. Uh-huh.
Q. Is that a yes?
A. Yes.
Q. Do you know when the last time you had home owners on the property was?
A. March. I'm not sure.
Q. March of '12?
A. 2012, I'm thinking it was the beginning.
Q. Do you know who the insurance carrier was?
A. Future Insurance. George Stolz.
Q. What was the, um, well, let's say from December of 2012 through September of 2012 do you know on average what your utility bills were for the property?
A. Say that one more time.
Q. What was the average utility bill at 339?

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A. From what month to what month?
Q. Any month. Let's say in the winter or in the summer if you want to separate it that way. Did you have an even pay plan with Consumers?
A. Until now.
Q. Okay. Did you have an even pay plan in the year 2012?
A. Let me see. I'm thinking we did.
Q. Okay. Do you remember the amount of that?
A. Ah, like 2, 230, 200, 200 to $300, I'm not sure, a month.
Q. Do you know what the highest utility bill you ever received on the property at any time was?
A. In a month?
Q. In a month.
A. The highest?
Q. Yep.
A. No.
Q. Are the utilities currently on at 339 South 5th Street?
A. Ah, the electric. I'm thinking the highest would have been in September of 2012. That's how we realized that the heat wasn't coming out of the vents.
Q. Okay. What was it?
A. That was in September, we had that chill like in September of last year, and, um, my son kept turning the heat up saying that there's no heat coming out, and

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I said, well, that ain't have nothing to do with Consumers, but it did show a higher rate for that September.
Q. Do you know how much?
A. The bill was?
Q. Yes.
A. No, I don't. I just know no heat was coming out of the vents.
Q. When was the gas terminated at the 339 address?
A. I'm thinking November of 2012.
Q. Okay. Was that a phone call you made to have the gas terminated?
A. Well, yeah. Actually I had it transferred from, um,–
Q. Go ahead.
A. I had the–I had it transferred from one house to another and then I terminated the gas completely because nobody was there.
Q. Okay. So you transferred gas from 339 to what address?
A. 351.
Q. Okay.
A. To the rental property.
Q. And that would have been in November of 2012?
A. Yes.
Q. Okay. And since November of 2012 the gas has been off at 339, correct?

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A. Yes.
Q. And the reason you shut the gas off was because nobody was going to be living there; is that correct?
A. Correct. And it wasn't–the heat wasn't coming out so we couldn't have lived there.
Q. Okay. Were you ever deficient on paying your Consumers bills at 339 before September of 2012?
A. What do you mean deficient?
Q. Were they late?
A. Sometimes.
Q. Okay. How frequent–how frequent were you late on Consumers payments?
A. I, ah, was set up with a pay plan so I couldn't default.
Q. What year?
A. Which I have defaulted.
Q. You were set up with a pay plan at 339?
A. Yes, several times.
Q. Do you have any of your invoices from Consumers or statements from Consumers for 339 South 5th Street?
A. Yes.
Q. Do you know where those are located?
A. Yes.
Q. Do you know for what years you have?
A. Um, I'm not sure.

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Q. Is it your recollection that you asked for Consumers to shut the gas off or the gas was shut off because of non-payment?
A. I transferred the bill and I shut the–shut it off.
Q. You shut it off?
A. I asked Consumers to shut it off because there was no heat coming through the vents so we moved over into the rental house and then we transferred. First I had to leave it out of the tenant's name that was moving in there, that was a hassle, and then we put it in my husband's name.
Q. So you lived there with no heat coming through the vents from the date of impact September of 2012 until approximately November of 2012?
A. Yeah. Yes. Yes.
Q. When did you have somebody from Gohm come on to the property?
A. Um, probably right after it happened 'til October, I can't remember, back and forth.
Q. Do you know if it was in the month of September?
A. Probably.
Q. Did you contact Gohm?
A. Yeah.
Q. Do you know who you dealt with at Gohm?
A. Troy and Mike.

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Q. Okay. And do you know how many times they came out to your property?
A. Several. Several times.
Q. All right. Do you know what they did?
A. They told me I needed to get my butt out of that house because–
Q. Are those the words that they used?
A. They didn't say butt.
Q. All right. Can you tell me what words that they used?
A. They needed–they were getting upset with me because I hadn't moved out. Ah, they told me that I needed to get my family out of that house because it could implode. They don't know what damage that that impact caused.
Q. Did they show you any areas where the implosion could occur?
A. Well, ah, by–by my bedroom window being pooched out the whole side there that was hit where my bedroom was.
Q. When's the last time you were in the home?
A. Ah, in it how?
Q. Where you were physically inside of the home.
A. Last week.
Q. Why were you there?
A. Getting some hangers.
Q. What is in the home right now?

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A. What is in the home now?
Q. Yeah. What property is in there? Is there anything in there of value? What's in there?
A. The kids, ah, left a lot of stuff upstairs in their room. My double oven is in there, my ceiling fans. Um, I think there's two bedroom suites there. Um, chest of drawers. Different end tables. The house is 800--the house I moved in was 800 square feet smaller so most of the stuff I had to put in my barn.
Q. Where is the barn located?
A. At the 339 property. I had to rent a refrigerator.
Q. Who maintains the 339 property now?
A. We do.
Q. Okay. And when you say we, who are you referring to, yourself and who else?
A. My son mostly. What do you mean maintain first?
Q. Do you mow lawn?
A. Yes. He does.
Q. Does anybody do any maintenance on the inside?
A. No.
Q. What about additional maintenance on the outside besides mowing the lawn?
A. Additional like what?
Q. I don't know. Does anybody do anything else besides mow the lawn at the property?

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A. No.
Q. Okay. Do you know if the light that was broken or flattened, I can't remember what you said.
A. They called it squished.
Q. Squished, has that been replaced?
A. No.
Q. Do you recall telling Mr. Rohde that you were going to find the light to replace?
A. Do I remember--
Q. Telling Mr. Rohde that you would find the light that you wanted it to be replaced with?
A. He asked me, ah, ah, Denise Armstrong asked me to go and find any light that I wanted and I didn't know if wires had been broken or--
Q. Did you do that?
A. No, I did not.
Q. Why not?
A. Why didn't I go--
Q. Correct.
A. Why didn't I do what?
Q. Go and get a light or pick out a light?
A. Because I wanted to find out the damages that had been done besides that light because at that impact the way it scraped down that house I didn't know if the wires had been torn apart or not.

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Q. Do you know if anybody inspected the wiring to make sure it was okay to mount a light?
A. To mount a light?
Q. Or to install a light?
A. No. Mr. Rohde sent his electrician out there, but I wanted somebody else to look at it because I was very, very upset. They just wanted to replace the light and put up, um, siding from my barn.
Q. As you sit here today, do you know of any damage to the wiring on the outside where that light was located?
A. No. Mr. Rohde's friend came back that next day and unplugged--two days later because it was starting to burn the house. I didn't know it was still coming back on.
Q. How is it that you secure the property right now?
A. What do you mean?
Q. Well, how do you make sure that there's no intruders, people getting into the home for stealing pipes or anything like that?
A. Well, I'm right next door. I can see. Um, they, um, I've got bars on the windows. Well, you said pipes going up under there. The ones that go under there I can see from my house and everybody in the neighborhood has been pretty good about watching the house.
Q. All right. Do you lock the doors?

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A. Yeah. I got really a lot of locks.
Q. Okay. Were those installed before or after the impact?
A. They were on there before.
Q. What about the bars on the--are the bars on the windows and the doors?
A. Bars on the windows, yes.
Q. Okay. Were those installed before or after the impact?
A. They were on there before.
Q. Do you have an alarm system?
A. No.
Q. Okay. Have you installed anything after September of 2012 to secure the premises, to keep out intruders?
A. Um, those, um, brackets you put on the back--well, they're brackets and you put a two by four behind them so the door can't be kicked in.
Q. Okay.
A. Oh, and I put extra pieces of wood in my sliding door and I got it jimmied up so it can't be lifted or anything.
Q. Okay. Is there exterior lighting still?
A. Yes.
Q. And is that activated or can be activated? Is it motion?
A. It's on--yeah, it's dusk to dawn is that what you mean?
Q. Yep.

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A. Yeah.
Q. Now, Troy and Mike were they both together every time that they came to your property?
A. No.
Q. Okay. Can you estimate how many times Troy was at your property?
A. No, I cannot.
Q. Was it more than five?
A. I'll tell you what at the 3--you're talking which address?
Q. Well, were they at multiple addresses for you?
A. Yeah.
Q. Why?
A. Because when I moved in the rental property, I had water going up under there.
Q. That's at the 351?
A. Yeah.
Q. So you were still dealing with Troy and Mike in November of 2012; is that correct?
A. Yes.
Q. All right. When was the last time you had contact with either of those two individuals from Gohm?
A. Oh, about three months, four months ago.
Q. All right. And what was that contact for?
A. Um, discussing the bill, discussing, ah, ah, work that

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needed to be done on the rental property.
Q. All right. You had a bill for the rental property?
A. Yes.
Q. How much was that?
A. $551.
Q. Have you paid that?
A. Not--I haven't paid 100 of it.
Q. So you have $100--
A. $125 I think it is.
Q. The balance is 125?
A. Yeah.
Q. Okay. Were you invoiced for any work that they did at the 339 address?
A. Um, I can't remember. I'd have to look through their invoices.
Q. Do you remember what, if anything, Gohm did at your property the 339 address?
A. They walked through the entire house. They went under--under there, um, they went all the way to the top. They went to the attic.
Q. Okay. Anything else?
A. Um, they took pictures.
Q. Okay.
A. A lot of pictures. A lot of pictures.
Q. Anything else?

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A. This is before I moved out.
Q. Okay. Um, have they been back to 339 after you moved out?
A. I think so. I can't remember. They were--we were--they were mostly watching, ah, yes.
Q. Okay. What were they there for after you moved out?
A. They were mostly next door.
Q. Okay. What were they in the 339 address for?
A. They were not in. They were looking at the bottom of my house, um, of the--from what I've been told the, ah, pous, pedis, they're not in place.
Q. Who told you that?
A. Several people. Gohm was one of them.
Q. Okay. Anyone else?
A. Troy and, ah, the guys from the inspectors. The names he gave you awhile ago.
Q. Sam and Barney?
A. Sam and Barney.
Q. Okay. Anyone else?
MR. ELLISON: It's Barney just to be clear for you.
MR. MAIR: That's what I said.
MR. ELLISON: Oh, I thought you said Bernie.
MR. MAIR: No, I said Barney.

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A. Reverend Whitfield. I'm trying to think if Mr. Whitfield--I don't think--Mr. Brown went half way up under there.
Q. When you say half way under there, what are you referring to?
A. When you open up the crawl space door where my walk-in closet is.
Q. Is that where the access is to the crawl space?
A. It's two on that one side.
Q. Okay.
A. The reason I said half way, he put his body--he looked half way. He didn't put his whole body in.
Q. Okay. Do you know if anyone from Gohm actually went into the crawl space?
A. Both of them did.
Q. Okay. And what about Sam and Barney?
A. Yeah. They stayed up there a long time, back and forth rather. They were in and out, in and out.
Q. Did you ever, at any time, did you ever go into the crawl space?
A. Uh-uh.
Q. No?
A. Uh-uh.
Q. You have to say no?
A. No way.

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Q. Do you know what's down there?
A. I know what I've been told is down there.
Q. What's your understanding of what is in the crawl space?
A. My heating vents, um, the pipes, the drain. Well, that's same thing. Um,--
Q. Did you store anything down there?
A. Uh-uh.
Q. Is that a no?
A. No.
Q. Okay. Who did you use as a contractor for heating at any time?
A. It started off Sun Furnace then Reggie & Sons, and, ah, well, that's who I use.
Q. Anyone else?
A. Trevino. He's the one that told me it was all on the ground. I knew I wasn't getting no heat.
Q. Is that the first time you used Trevino?
A. For that particular job, yeah.
Q. Who--do you know what company serviced the furnace prior to September of 2012?
A. Um, the furnace itself?
Q. Yes.
A. I haven't had any issues. I'm trying to think of one, not one, Jose. Jose, I'm trying to think of the name

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of his company. He's got a heating and cooling. Ah, I'm trying to think did he do the furnace or the hot water tank. I haven't had any trouble. That was a fairly new furnace.
Q. Okay. When was that furnace installed?
A. I'm trying to think. Um, I bought the two at the same time. Well, the--the one at the house I'm in is newer than--because it hadn't been used.
Q. If you can turn to page four of Exhibit 1 there. Right there. Do you recognize that list there?
A. Yeah.
Q. I reviewed this and I understood that the furnace was installed sometime between 1990 and 1992, does that refresh your memory?
A. Yeah, but it had been done after that and I was going to ask him when I wrote this down did I put the later one on it.
Q. So there--
A. The newer one was done in, ah, shoot, 2006. I don't know. Wait a minute. It was seven years ago so that's 2006.
Q. Sure.
A. Because I hadn't rented the house. I had just got a tenant, let me see, 2003, 2003 because I had three tenants before that.

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Q. Three tenants where?
A. In 351.
Q. Okay.
A. Because the reason I'm saying that the 351 furnace is newer than mine is because it hadn't been used through the winter because the tenants I had didn't--a couple of them didn't make it to the winter time for it to be used.
Q. When you didn't have a tenant in those properties or in that property, what did you do about heat?
A. I shut them down.
Q. So there was no heat at all?
A. At which house?
Q. 351.
A. At my house now?
Q. Yes.
A. Where I'm living?
Q. Yes.
A. I have heat.
Q. I understand that. When you were not living there and that was a dedicated rental and you did not have a tenant over the winter, what would you do? Would you shut the gas off?
A. Yeah. And drain the pipes and, ah, took my hot water tank out.

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Q. Did you do that at 339 in November of 2012 drain the pipes, take the hot water tank out?
A. Wait, what year?
Q. 2012.
A. Did I do what?
Q. When you left in November of 2012 at 339, did you drain the pipes?
A. Yes.
Q. Okay. Did you take the water heater out?
A. No. I just drained it.
Q. Who drained the pipes for you?
A. Um,--
Q. And I'm talking 339.
A. Okay. I'm trying to think who drained it. I think this guy I use, a handy guy.
Q. What's his name?
A. Johnny.
Q. Do you know the last name?
A. Huh? Ah, I can't think of his last name.
Q. Do you have a contact number?
A. Yeah. It's not in--I don't know--I don't know it by heart. I just press buttons.
Q. And do you have that on you?
A. On my phone. No, I left it in the car.
Q. All right. I'd like his contact information.

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A. (Witness nods head.) What is Johnny's last name. It ain't Jackson.
Q. Well, if it comes to you, let me know.
A. Yeah. You call people by their nicknames and stuff, you don't know their real names.
Q. I understand. And with cell phones nobody knows anybody's number any more.
A. They change them too often.
Q. That's right. Okay. Any other precautions you took in November of '12 to secure 339 or to make sure that it was winterized I guess is a good term?
A. Say that again.
Q. Did you winterize the 339 address?
A. Yes.
Q. Okay. What did you do to winterize it?
A. Mostly to drain all the liquids out then.
Q. Did you shut the water off?
A. Yeah.
Q. Okay.
A. Yes.
Q. Anything else?
A. To winterize, um, I'm trying to think did I put plastic on both of the doors? No, I didn't do nothing else. The water was the most important thing.
Q. What type of basement is at the 351 address?

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A. There is no basement.
Q. Is there a crawl space?
A. Yes.
Q. Okay. Is it a similar type crawl space that 339 has?
A. Yes, except it's more cement. It's cement under there.
Q. Okay.
A. I've never been under there either.
Q. What is under the 339 address? What's the base of the crawl space?
A. I don't know.
Q. All right. Do you know who you purchased the furnace at 339, who did you purchase that from in 2003 at 339?
A. Ah, Reggie & Sons.
Q. Reggie & Sons. Okay. Do you know if they're still in business?
A. No, they are not.
Q. Okay. Do you have any documents or invoices or purchase agreements or anything like that from your purchase of that furnace in '03?
A. I don't remember. I can't--they're in my file cabinet probably.
Q. Okay.
A. I was going to say I wonder did he still have some, but...
Q. Do you know when the last time the furnace was serviced

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at the 339 address? Did you have it maintained every year by--
A. You mean cleaned out?
Q. Yep. Would you do that every year?
A. I'm saying Jose would have been the last one to clean it out.
Q. Did you know what year?
A. Probably 2010.
Q. Okay.
A. 2010 or 2007, one of them, you know, because every three years, 2010 I think.
Q. Okay. Did anybody tell you prior to leaving in November of '12 that the crawl space required heat through the winter?
A. Did--repeat that.
Q. Did anybody prior to you leaving in--
A. Anybody like who?
Q. Anyone.
A. Okay.
Q. Prior to leaving the property in November of 2012, did anybody tell you that the crawl space required heat through the winter?
MR. ELLISON: I'm going to object on hearsay grounds, but go ahead and answer, if you can.
A. I don't know. I don't remember anybody telling me

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that.
Q. Okay. After or at any time has anybody informed you that the crawl space needed to be heated at the 339 address through the winter?
MR. ELLISON: Same objection.
A. Ask me that again.
Q. Sure. At any time has anyone ever informed you that the crawl space at the 339 address requires heat through the winner?
MR. ELLISON: Same objection.
A. I don't--I can't remember.
Q. Have you ever heard that before?
A. No.
Q. Okay.
MR. ELLISON: There you go.
A. Not that I can remember.
Q. How would you describe the end of--
A. I thought heat went down there anyway, but anyway...
Q. Are you still a Gohm customer right now?
A. Yes.
Q. Okay. And you last used them three to four months ago; is that correct?
A. I talked to, um, Troy. I wanted to talk to Troy about making an appointment to see about, um, lifting my house up that I'm living in.

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Q. All right. When is the last time you had a conversation with anyone at Gohm about the 339 address?
A. About the 339 address?
Q. Yep.
A. It's been awhile.
Q. Okay. Can you think of when?
A. After we moved out, I don't think it was that much discussion left. They were concerned about our safety.
Q. Did anyone at Gohm give you an estimate as to the cost of what they would do at the 339 address?
A. Do like what?
Q. I don't know. What were they there to do?
A. They were just looking at the way the house had shifted from the hit.
Q. Okay. Have you talked to anybody at Gohm about the fact that you filed a lawsuit, this lawsuit?
A. Probably, yes.
Q. Do you know who you talked to?
A. I probably told everybody that I talked to there.
Q. Well, what would you have shared with them about this lawsuit at Gohm?
A. Nothing but I'm trying to get my house, ah, repaired or replaced.
Q. Have you asked for them to assist by testifying in this case, anyone at Gohm?

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A. Have I asked them?
Q. Yes.
A. Not yet.
Q. Have you discussed with anyone at Gohm their deposition testimony or what their testimony would be?
A. No.
Q. Okay. Have you discussed with anybody what their deposition testimony would be in this case?
A. No.
Q. Just so we're clear on the record here, after you moved out in November of '12, you were done with Gohm with respect to the 339 address; is that correct?
A. What month and the year? What month?
Q. Well, I'm using the month that you moved out November of '12?
A. I'm saying I'm thinking they didn't have--I don't think they went back in there. They might have took pictures after I moved out.
Q. Do you have any of those pictures?
A. No. Do I?
Q. He can't help you.
A. Who?
Q. Oh, I thought you were asking him.
MR. ELLISON: No, she wasn't looking at me so...

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A. No, I'm just thinking. And then you said he can't help me, I hope he can.
MR. ELLISON: He just means I can't help you give answers to your deposition there so...
THE WITNESS: Okay.
Q. You don't have any of those pictures?
A. From Gohm?
Q. Yes.
A. No. They got them.
Q. Did Gohm prepare any type of report for you?
A. Shoot, let me think. You mean report as to--
Q. Anything.
A. --the damages at 339?
Q. Yeah. Did they give you anything in writing about the 339 address?
A. Maybe they did.
Q. Okay. What would they have given you?
A. I have to look. I got a--
Q. Where would that be?
A. I'm not sure. I have to look at my files. I don't have a filing system since I moved. I got stuff in, um, satchels. Um, I got a satchel with Gohm's stuff in it, but to remember if they gave me an itemized statement of repairs that's what you're asking?
Q. No. I'm just asking of anything in writing that Gohm

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gave to you, anything?
A. I--I have to look.
Q. All right. I'm going to ask your attorney to have--for you to produce the satchel with the Gohm stuff in it. Is that an accurate description of where anything would be?
A. In the satchel?
Q. Yes.
A. But it's got a lot of other stuff in it. Why I just can't produce papers?
Q. Well, what else is in there?
A. Personal papers that has nothing to do with this case.
Q. All right. Well, my request is going to be specific to what is at issue in the case and specifically what came from Gohm that's in that satchel.
A. Okay.
Q. Is that an accurate enough description of where that documentation would be?
A. That's good.
Q. Okay. What was it that Trevino did at the property after the impact?
A. Um, went under there to see why I wasn't getting no heat under the house.
Q. All right. And what did Trevino tell you?
A. That everything was on the ground.

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Q. Is Trevino the person that was there or is that the name of the business?
A. That's his name Ray Trevino.
Q. Okay. And what did he tell you was the problem that he observed in the basement or the crawl space?
A. The main heating, um, unit was on the ground and several of the vents had been pulled out of the floor.
Q. Okay. Go ahead.
A. I was going to say my son tried to pull some of them up and tape them back up and I told him that's not going to work.
Q. Did Ray Trevino give you an estimate as to how to repair that, just that portion?
A. Yeah, he gave me a--
Q. How much?
A. How much?
Q. How much was the estimate?
A. I'm thinking 22 to 2800.
Q. Did you turn that estimate over to Rohde Brothers?
A. To Rohde Brothers, no.
Q. Have you turned that estimate over to anybody?
A. I think I gave a copy to my attorney.
MR. MAIR: I haven't seen that.
MR. ELLISON: Me neither so...
THE WITNESS: Trevino?

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MR. ELLISON: No. Trevino, I have his name, but not--
THE WITNESS: Oh, okay. Well...
MR. ELLISON: Throw that on the list then, too.
MR. MAIR: Yep.
Q. Any other estimates that you received after the impact about repairs?
A. Any other?
Q. Any other estimates if somebody says I'll repair this portion or all of it or anything of that nature.
A. No, because too many people is telling me too many different prices and, um, I didn't know, after they said the house was destroyed, I didn't know what to--what to get an estimate for--
Q. All right.
A. --about new housing.
Q. What prices were you getting then?
A. To repair?
Q. Yes.
A. Ah, ah, some said, ah, 100,000 this and--or more, but, um,--
Q. Who said that?
A. I'm trying to think.
Q. Okay.

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A. But since I was told I could not rebuild because of the housing code--
Q. Who told you that?
A. Um, Barney and, um, I think Barney, of the code--the house was built in 1869.
Q. Okay.
A. Um, they said that my house was--could not be repaired because of the housing code.
Q. Okay. Back in 2010 when you rented the property to the pastor, did you have a renter or a rental permit from the city?
A. You mean a license?
Q. Yeah.
A. Yes.
Q. Okay. Was the property inspected?
A. I'm trying to think. Wait. Was the property inspected?
Q. Yes.
A. I think it was. I'm not sure. I know I took--I can't remember. I think we did. I got another house that's got a lot of units in it so...
Q. Do you know what the results of the inspection were at 339?
A. No.
Q. Can you think of any time prior to the impact that the

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house was inspected for purposes of habitability?
A. Besides, um, the insurance?
Q. Well, anybody. Prior to the impact, any inspections related to whether or not the place was habitable?
A. No. I still don't understand the question. Repeat the question.
Q. Prior to the impact in September of 2012, had anybody inspected the 339 address to determine whether or not it was compliant with code or habitable or anything of that nature?
A. No.
Q. When was the last time you replaced the water heater at 339, at the 339 address?
A. Early 2000. It should be on there. It's--it's not that old.
Q. My eyes might be failing me, but I don't see it on the list.
A. Well,--
Q. Let me ask you this way. Did you pull a permit to have the water heater installed in early 2000?
A. I'm thinking Reggie put it in. Yes. Well, I didn't pull it.
Q. Who would have?
A. Reggie & Sons.
Q. At any time can you think of any permits that were

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pulled for any work that was done at 339?
A. From what year to what year?
Q. From 1869 until today's date.
MR. ELLISON: I'm going to object to that. I mean that's overly broad. It's quite vague and you're asking someone to--a memory of stuff back that far. I'm going to object.
Q. You can go ahead and answer.
MR. ELLISON: If you can.
Q. Can you recall one permit that was ever pulled?
A. For the hot water tank, I mean the furnace.
Q. Okay.
A. Um,--
Q. Was that the '03 installation or the '90 to '92 installation?
A. The later one, the 2003. I'm trying to think. The roof, um, Frank pulled the permit to put a window in my attic. Oh, there you go. Um, oh, let me see. The siding on the house.
Q. Was there a permit pulled for that?
A. Huh?
Q. Was there a permit pulled for that?
A. Yes.
Q. Okay.
A. Well, here they all are here.

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Q. Well, those are improvements. It's my understanding on page four of Exhibit 1 those are improvements that are listed.
A. Okay.
Q. Do you know of any permits that were pulled for those improvements that are listed on page four?
A. The wiring would have been from Charles Galloway.
Q. Okay.
A. Frank was with Sun Furnace.
Q. Is Charles Galloway associated with Galloway Enterprises?
A. Yes. He's my deceased brother.
Q. What is the business of Galloway Enterprises? What type of business is that?
A. Real estate.
Q. Any other permits that you can think of that were pulled?
A. Not that I can think of.
Q. Okay. Prior to September of 2012, and we'll use the date of the impact as a point of reference going backwards, can you describe for me in your words the condition of the inside of your residence at 339?
A. It was gorgeous to me.
Q. Okay. Were there any areas that you considered needing work inside that home?

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A. Any areas?
Q. Yeah. Any--was there any work that you felt needed to be done inside that home either cosmetic or, um, you know, to the wiring or plumbing or any type of work that you felt was necessary or you wanted done?
A. Necessary or just wanted?
Q. Both.
A. Necessary? Well, I want--I'll go back to the want first.
Q. Sure.
A. We had paneling upstairs in my daughter's bedroom and the guy that painted it he overlapped it instead of removing or fixing it right, I wanted that wall done.
Q. Okay.
A. Let me think. Needed doing? I can't think of needed.
Q. You can't think of any?
A. I'm trying to think. I've been in a daze. I haven't had sleep. I'm under the doctor's care. I've been a nervous wreck ever since this happened.
Q. Okay.
A. Here I am 60 years old trying to figure out where I'm going to live. It needed, needed, needed. Oh, my gazebo the front of that and my deck needed painting. My gazebo is in the yard.
Q. Would you agree that the home as it existed prior to

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the impact was very old and very worn?
A. The house was built in 1869 what do you mean?
Q. Would you agree with that, that it was--
A. I don't understand your question.
Q. That it was very worn?
A. Worn?
Q. Yes.
A. No, it was not worn.
Q. Okay. Did the home exhibit signs of age?
A. If you dug up under there somewhere, yeah. After I removed my refrigerator out, you could see the lat--the lattice boards I think it is.
Q. Would you agree that the repairs and the upgrades that were performed as part of page four of Exhibit 1 some of those showed evidence of low quality of workmanship?
MR. ELLISON: I'm going to object on the basis that she's not an expert that can testify to this, but you can answer if you can, Sylvia.
Q. Go ahead and answer.
A. I think my house was, ah, pretty good, and a lot of work I did myself. Not any major stuff, but the remodeling stuff.
Q. Would you agree that prior to the impact that your house was in a distressed condition?
A. No, it was not. What do you mean by distressed?

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Distressed.
Q. Do you understand the term?
A. Distressed I want your meaning of it.
Q. Well, I'm not here to testify today. Do you understand that term?
MR. ELLISON: Well, if she's going to accurately answer your question, she's got to understand the basis of it.
MR. MAIR: And I'm trying to get there without you interrupting me, okay.
MR. ELLISON: I'm trying to help. I'm trying to--
MR. MAIR: You're--you're--you don't need to help other than to object.
MR. ELLISON: I'm placing an objection that your questions are continually getting more and more vague. If you want to ask a direct on the point question, she'll be happy to answer it.
MR. MAIR: And I'm trying to get there without you interrupting me.
MR. ELLISON: Okay. Well, you're not doing it very well here today so...
MR. MAIR: Well, fortunately that's not why we're here today for you to analyze how well or not well I'm doing.

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MR. ELLISON: Well, that's good.
MR. MAIR: And I'm asking you to stop interrupting me on this record. It's very, very obstructive.
THE WITNESS: Is it okay if I interrupt?
MR. MAIR: You can interrupt.
A. Well, can you explain to me what distress means to you?
Q. Do you understand the term distressed?
A. I do.
Q. Okay. Based on your understanding of the term distress, would you agree that your home was in a distressed--
A. I do not agree to that.
Q. Thank you.
A. My house was gorgeous.
Q. Okay. Are you aware that that was the opinion of Mr. Martlew?
A. Mr. who?
Q. Martlew.
A. Who is that?
Q. You're expert. That the house was in a distressed condition?
A. After I moved all that stuff out of there, yeah, I guess so. It is in distress now. It's really in distress now. The floors are bulging. It was

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distressed when it got hit.
Q. None of that was present before September--
A. No, it was not.
Q. You've got to let me finish. None of that was present before September of 2012?
A. None of what?
Q. The bulging of the floors.
A. No.
Q. Or doors that didn't close, anything like that?
A. No, it was not. And this person who did you say, Martin Lew?
Q. Martlew.
A. Who is that?
Q. Your expert.
A. Who--I--I don't know who you talk of.
Q. Okay.
A. Martin Lew?
Q. Barney Martlew.
A. Well, after they came in and seen everything taken out, my cornice boards were gone. Like I say I've never replaced any of the windows. Um, after people move out of a house, it looks stressed. I had to take a lot of this stuff that was in the house to make the other house function. Like the, what, the, I think my faucet went out over there.

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Q. What about the faucet?
A. I'm thinking, um, distressed, um, after we took everything else out, it looked distressed to me. I guess it would be looking distressed if you're talking about that. It wasn't distressed while we were living there and before the house got hit.
Q. You provided as part of your answers to discovery requests a series of pictures. I've printed those out and we're going to attach those as an exhibit. We'll attach it as Exhibit Number 2.
MR. ELLISON: I'm going to place an objection. If you're going to make reference to specific photographs, I would ask that each one be specifically marked if you're going to use them for purposes of deposition asking questions about. If you're just looking for authentication purposes, I have no problem, but if you're going to make specific questions to each one, I'd ask that each one be marked.
MR. MAIR: No. We can mark it as one package or we can do it page by page.
MR. ELLISON: It's up to you, but if you're going to ask questions about specific ones, we need to go page by page.
MR. MAIR: That's exactly what we're going to do. We don't need to make separate exhibits.

MR. ELLISON: If you--can we go off the record if it's all right with you?

(Discussion off the record.)

MR. MAIR: We've gone off the record and discussed the parameters of this deposition and the time constraints that are involved and it appears that counsel has agreed to continue this deposition to a later date that's mutually convenient for all involved and would be subject to additional production of documents to the extent that those documents exist and are available for production. I will prepare that list and provide it to Mr. Ellison in the next day or so.

MR. ELLISON: That's acceptable to me with the understanding we will attempt to produce those in good faith at the time of the next adjourned date of deposition of Sylvia Jones to the extent anything that Mr. Mair believes that should exist that we didn't produce at that time, we would gladly welcome a discovery request to fulfill that in the same under the normal course of the discovery rules.

MR. MAIR: Okay.

(Deposition concluded at 3:49 p.m.)

STATE OF MICHIGAN)
)
COUNTY OF SAGINAW)

I certify that this transcript, consisting of 106 pages, is a complete, true, and correct record of the testimony of SYLVIA DENISE JONES, held in this case on August 28, 2013.

I also certify that prior to taking this deposition, SYLVIA DENISE JONES was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or financially interested in the action.

September 9, 2013 _____

Debra A. Shimel, CSR-4931
Notary Public, Saginaw County, MI
My Commission Expires: 3-6-2018

das

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

JONES FAMILY TRUST, SYLVIA JONES
& BOBBY JONES,
Plaintiff,

vs.

Hon. ROBERT L. KACZMAREK
CASE: 13-019698-NZ-2

SAGINAW COUNTY LAND BANK
AUTHORITY, CITY OF SAGINAW,
ROHDE BROS., EXCVATING, INC. and
HARDHAT DOE, an unknown employee,
Defendant.

_____/

DEPOSITION OF WALTER MARTLEW

Taken by the Defendant on the January 14, 2014 at the offices of O'Brien and Bails, 141 East Michigan Avenue, Kalamazoo, Michigan, at 11:21 a.m.

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Kalamazoo, Michigan
Tuesday, January 14, 2014 - 11:21 a.m.
(At about 11:20 a.m. Exhibit 2 was marked)
(At about 11:20 a.m. Exhibit 3 was marked)
(At about 11:20 a.m. Exhibit 4 was marked)
REPORTER: Do you swear or affirm the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: Yes, I do.
WALTER MARTLEW,
(At 11:20 a.m., sworn as a witness, testified as follows)
EXAMINATION
BY MR. MAIR:
Q This is the time and place set for the deposition of Marty Martlew taken pursuant to notice and for discovery purposes only.
Mr. Martlew, my name is Greg Mair, I represent the City of Saginaw and Rohde Brothers in a case that's been filed entitled Jones Family Trust and Sylvia Jones and Bobby Jones. I take it you have given deposition testimony before?
A Yes, I have.
Q I am not going to belabor you with the process. If at any time you need a break or don't understand my question, speak up.

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A I will.
Q State your full name for the record, please.
A Walter Harold Martlew.
Q You go by Barney, correct?
A Yes, I do.
Q What is the professional address for you?
A 7376 Dunross Drive, Portage, Michigan, 49024.
Q What business do you run out of the Dunross address?
A The business name is Visideo Partners, a limited liability corporation.
Q Do you have any other partners in that business?
A No.
Q So you are the sole principal?
A Yes.
Q All right. The billings that you have submitted in this case have been through Visideo, correct?
A Yes.
Q How do you know Sam Hudson?
A Sam and I have known each other for probably twenty years. Backing up, then I was the construction manager for a nonprofit organization called Christian Outreach Rehab and Development. It is similar to Habitat for Humanity and it was meant to address the housing quality needs of Benton Harbor. That was back in the early 1990s.
Q Okay.

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A That is when I first met Sam.
Q And how far did you go in school?
A Graduate school. I have an MBA.
Q From?
A From University of Notre Dame.
Q And your undergraduate degree?
A Bachelors of science in civil engineering from the University of Michigan.
Q Do you hold any certifications or licenses?
A I am licensed as a registered professional engineer in the State of Michigan. I have invalid -- not invalid, but inactive license for building inspection and plan review with the State of Michigan.
Q When did that licensure lapse?
A 2011.
Q Any reason why that was lapsed?
A If you are not working for a municipality, you cannot renew it.
Q What municipalities have you worked for?
A City of Benton Harbor.
Q Okay.
A I am now on the Board of Directors for an organization called KABA, Kalamazoo Area Building Authority, which is an intra-governmental agreement between the City of Comstock, Kalamazoo Township, Oshtemo Township and Cooper Township, to

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oversee building department responsibilities.
Q And what are your duties as a board member?
A Provide direction, oversight and -- direction and oversight for the general operation of the agreement.
Q Are those like residential inspections? Would that include that?
A Residential and commercial. We completely do all of the building inspections for those.
MR. ELLISON: What was the name of this thing you are with?
A KABA, Kalamazoo Area Building Authority.
MR. ELLISON: Thank you. Sorry.
BY MR. MAIR:
Q So that entity kind of brings together the city inspector duties, is that fair?
A Yes.
Q How many board members are there?
A Five.
Q Is that elected or appointed?
A It is appointed. There is a member from each municipality and then an at-large member. I am the at-large member.
Q You are the at-large member?
A Yes.
Q Who appointed you?
A I was appointed by the rest of the board.

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Q Okay. When you were employed by Benton Harbor, did you have experience doing residential inspections?
A Yes.
Q Have you ever done private inspections?
A Only for as a legal professional -- not professional, but expert witness.
Q Okay. When is the last time you did a residential inspection for a municipality?
A 2011.
Q Okay. Do you do commercial inspections?
A Yes.
Q And same time period, 2011?
A Yes. Michigan does not draw a distinction between the license for commercial or residential inspection.
Q Do you hold a builder's license?
A I do not.
Q Okay. You mentioned expert witness consultation. Approximately how many times have you done that?
A A year.
Q Does that include this case?
A Yes.
Q Do you recall the other two cases?
A The other two were for local attorney Terrence Lilly. One dealt with an issue where the basement wall of a house collapsed due to severe flooding. And the issue at hand was,

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was the flooding caused by city's negligence in improperly sizing storm sewers so that they were insufficient in size to handle the flow. I do not -- that must have happened about 2011. And then 2011 or 2012 there was a second case for Mr. Lilly that dealt with a personal injury, someone fell from a deck at a house. And I don't recall too many of the details of that.
Q Do you know if you have ever been qualified as be an expert witness in the state of Michigan?
A If that is a distinction by the State of Michigan, I would say no, I have not.
Q That was a really bad question.
A Okay, good.
Q Have you ever provided trial testimony in any court in the State of Michigan?
A Not as an expert witness.
Q And have you provided expert deposition testimony in those two prior cases for Attorney Lilly?
A I don't think they went to deposition.
Q You had, as part of your job duties and responsibilities with Benton Harbor, the responsibility to testify in court if necessary, correct?
A Yes.
Q Do you know if you were ever qualified as an expert in any of those cases?

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A There was one case that went to court. It was settled before court. So one case that was settled before court.
Q That would have been in connection with your employment at Benton Harbor?
A Yes.
Q How is it that you were retained as an expert in this particular case?
A Attorney –
Q Ellison?
A Ellison knew of Sam's and my credentials through some work he had done for Terrence Lilly. And I have used Terrence Lilly for legal matters.
Q Okay.
A So that was an established relationship there.
Q Do you know when the first contact you had with Mr. Ellison's office about this case?
A I think it would be in my notes, of which you have copies.
Q Those are the handwritten notes?
A No.
Q Okay.
A That could be part of it. It would have been March of 2013, because in those handwritten notes I have notes for time that Sam and I spent driving to Saginaw. That was April 2nd of 2013. So Phillip and I would have spoke sometime in March.
Q What information did Phillip share with you at your initial

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consultation, if you can recall?
A I don't recall much, other than letting me know that he was working on a case that dealt with damage caused by a demolition project. And I don't recall anything more than that.
Q All right. In terms of your engineering experience, are you qualified to, and past experience or through your training, to make determinations of impact and how that impact may or may not have caused damage to a structure?
A I think the credential of being a licensed professional engineer in the State of Michigan would qualify me for that.
Q Okay. Did you actually do any of those measurements or analysis in terms of the impact that was caused in September of 2012 at this residence?
A I am not sure I understand your question.
Q That was a terrible question, that's why. Did you, in terms of the impact that happened in September of 2012 at the Jones' family residence, did you do any measurements in terms of how much force was applied to the structure and how much that force caused the structure to move and in what way the structure moved?
A I would have no way of determining the actual force in terms of foot pound.
Q How about in terms of how the structure was impacted from the force?

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A We did go through, and using a level, a carpenter level to see what was true and plumb, checked different walls of the structure itself. We looked at the floor. We didn't do any taping and diagram, if that is what you mean.
Q All right. And you were basically going on the measurements and data that you were receiving in April of 2013. Did you have any data measurements, information pre-impact, to compare those measurements with?
A I did not. We took no measurements, so there was nothing to compare.
Q So can we agree that your inspection of the property was only able to give a perspective of what was plumb or what the measurements were at that time and then attribute it to some other event? Is that basically what you did here?
A Well, I probably wouldn't use those words. The way I would phrase it was that we were – we were retained, Sam Hudson and I were retained to come and do an analysis and evaluation of the building in an attempt to ascertain what damage had been caused by the uncontrolled strike of the adjacent demolition project falling against said property in question.
Q Okay. And in your words, how did you do that analysis?
A A lot of it was in a forensic analysis, the way we approached it was to first talk with the homeowner and just have a casual conversation to find out from her what had occurred. And not seeking guilt on any party's part, rather asking questions and

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making observations to try and determine just what happened and to try and make sense of what we saw. And so the first step was to talk with the homeowner. The second step was to do both a tour of the building internally and externally and then also down in the crawl space area below the structure itself.
Q Okay. And as best as you can recall, how long did that process take, from start to finish?
A I want to say we were there for probably three hours.
Q Do you remember what information the homeowner provided you?
A Just some general information. But I did cite in the letter I wrote to Attorney Ellison regarding comments that she made and how what we later ascertained seemed to fit with things that, comments that she made, where she would have had no knowledge of why, she just expressed what she experienced and we were able to see some of why and see how they fit together.
Q Can you provide any specific examples?
A There's one – two actually. One dealt with a sagging floor in the front closet of the front bedroom on the first floor. She was afraid to go into that closet where her clothing was stored, because the floor had a serious depression and she was concerned that it was going to collapse. She said that didn't exist before. That was the comment that she made when we first were having the conversation with her before we had done any analysis of the building.

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Later on, when we were in the crawl space, we did notice that there was one floor joist that seemed to be knocked loose. And I did cite that in my letter and that was in the vicinity of the sagging floor, there was a potential of a cause and effect relationship right there.

A second example is where Miss Jones mentioned that she had inordinate high heating costs after the strike occurred, that the register in the first floor front bedroom did not expel any heat. Later on, when we were in the crawl space, we saw where the ductwork going to that register had collapsed and pinched off. And so there was no heat actually getting to that register. But there again, a reasonable cause and effect relationship.

Q All right. In terms of the high heating costs, did she share with you any specifics in terms of gas usage or the difference in cost that she was realizing?

A She mentioned there had been one bill, I believe it was for $700 that she paid after the strike. And after that is when she had utilities turned off.

Q Did you do an independent analysis of the utility usage at this residence?

A No.

Q Do you have any idea of the averages of utility cost of this residence over say a period of three years?

A I do not.

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Q Do you recall if she represented that the bill was $700 for both electric and gas or just gas?

A I do not recall.

Q Did she provide you with any understanding of what the cost for utilities would be for that month?

A She did not.

Q Have you done any analysis about the average cost for the utilities at the residence?

A I have not.

Q So you basically took her representation at face value in terms of I had a bill -- utility bill for $700, that is the reason I had the gas shut off and moved out?

A Yes.

Q Did you have any reason to question the veracity of that claim?

A No.

Q Now, in terms of the sagging floor in the closet and the loose floor joist.

A Yes.

Q Aside from Mrs. Jones' representation that that existed only after the impact, was there anything that you found in your analysis and inspection that confirmed that those two events were related?

A No.

Q Okay. So in other words, you have no idea of knowing

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pre-September 18, 2012, whether or not that joist was loose or not?

A I do not, no.

Q Or whether or not that joist was anymore loose than it was prior to that day, is that fair?

A Yeah. I do not have any preexisting condition information.

Q All right. In terms of your inspection on the exterior of the home, what did you observe in terms of the nature and extent of the damage from the impact?

A The outside of the house, for the most part, actually looked good, relative to the age of the house. The two areas of damage that we would say were attributable to the building strike, one would be on the south wall where a security light had been smashed. And that may have been evident in the video that was taken by the security camera.

The other was just an interesting point that we noticed, Sam and I discussing it based on our respective areas of expertise. The west second floor gable end of the building had the aluminum siding look like it was peeled from center going out to the edges and to create flukes. And a very strange type of condition that existed. And in my letter I did cite that and I said what we are assuming happened there and what we perceive happening, is that the upon the building being struck, the shock reverberated through -- through the building, and where it let loose was to cause the vinyl siding

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to flex and come unhooked at the ends, the upper piece from the lower piece all the way up on the gable.

Q Were you able to generate any other cause for that condition other than directly attributable to the impact?

A I have never seen anything like that and it's not a normal condition that would happen, so no.

Q Could that have been caused by low quality workmanship?

A No.

Q Not possible?

A Not possible.

Q Okay.

A Not possible.

Q Can we agree that you did observe, throughout the home, low quality workmanship?

A I would not make that statement. I would say where I did reference low quality workmanship, I would say that could apply to new plumbing that was done. And I did cite in my letter that for the age of the house, the original plumbing probably would have been cast iron or Steel. That did deteriorate over time and so when the plumbing was redone there was extensive use of PVC pipe. PVC it allowed by code. It is not the best material to use, but it is common material. And so my reference to low quality would be using PVC for pottable water instead of copper piping.

Q Okay. Any other low quality workmanship that you observed

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within the home?
A Perhaps some -- the way some of the ductwork was suspended in the basement. Just seeing the extent of collapse, it seemed like that was a catastrophic collapse and so that surprised me. And I guess that would be a point that I would say wasn't done right. I do not know the answer to that.
Q All right. In terms of the installation of the ductwork there, did you observe support mechanisms that were in place at one time?
A Yes.
Q Okay. Would you, in your professional opinion, consider those support mechanisms to be adequate for the ductwork?
A I would probably call them sufficient based on their existence over an unknown amount of time.
Q All right. Let's go back to your days at Benton Harbor. If you were inspecting a residence that had a crawl space identical to the Jones' residence, is that something where the supports that were in place would pass and meet the code requirements in your inspection?
A If they were existing, yes, they would.
Q Did you notice the use of duct tape to connect ductwork to the bottom of the floor?
A I do not recall seeing that.
Q Let's assume that ductwork was used to connect the flex pipe to the bottom of the floor.

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MS. LUSK: Duct tape?
BY MR. MAIR:
Q Duct tape. Duct tape. To connect the bottom of the flex pipe to the floor for the runs.
A I do not recall seeing that.
Q I could show you the picture.
A Okay.
Q And I guess before I do that, have you reviewed any documents that have been generated by any of the defense experts?
A No.
Q Have you been provided those documents?
A No.
Q I am going to represent to you that these were photographs that were take by Doug Rettinger, the defense expert that was retained in this matter. And I am going to give these to you in order his inspection was done in, in September of 2013.
A Okay.
Q My question pertained to this photograph here.
A Um-hum. Okay.
Q It appears that there is a hole cut into a metal plate for the connection of the ductwork. Is that what you see there?
A Yes. What I would expect that to be is where there is a floor register up above.
Q Okay.
A And then where you run the flex duct in, you tape that joint,

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that is what I would expect that to be, not actually taping the ductwork to the floor joist.
Q Okay. Do you see the duct tape here?
A Yes.
Q That appears --
A Yes.
Q Wouldn't that indicate to you that this pipe here, resting on the floor, would have been taped to this connection?
A No, not given that the proximity is right adjacent to the hole that would go up into the floor register.
Q Wouldn't you expect for this metal plate here to have a flange for the pipe to attach to?
A Not necessarily, no.
Q So you have no criticisms about the manner in which this plate has a hole cut into it and the duct pipe -- or the piping that was attached to it?
A No, given the age of the house, I would say because it used large floor registers, that you would run ductwork up into, into actually a box quite larger than what you would now have as a typical floor register now. I would say that is probably an acceptable way to make a transition.
Q Okay. Now, in terms of this connection here in this photograph, wouldn't you agree that, if not properly supported, that is prone to collapse?
A I guess I would need to know what is defined as properly

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supported.
Q Okay.
A If -- and I mean, let me expand on that. I am not trying to avoid answering the question. But if you have -- flex duct is flexible by nature, and so you do need to support it intermittently. If you are going from a short run from your trunk line to a register area you may be able to support it at either end. If you are going very long, you would need intermediate supports. And so depending on the length of the ductwork, I would expect to see some sort of intermediate support.
Q Are you familiar with any of the guidelines pertaining to the installation of ductwork?
A No.
Q I have already forgotten what the -- are you familiar with the Sheet Metal and Air Conditioning National Association?
A Yes.
Q And are you familiar with the standards associated with that entity?
A I know there are standards. I do not know what they are.
Q Okay. Do you know whether or not the HVAC components in the crawl space met those standards for that entity?
A It would depend on what year code was being used when they were installed.
Q Okay.

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A And for example, Michigan Building Codes are revised every three years.
Q Okay.
A Just because they are revised every three years, that doesn't mean they are adopted in the year of revision. And so you would have to first go back to the year that work was done, which I do not know, and say what did the code require at that time. With no other work having been done since then, it would not be an issue for a building inspector.
Q Let's say in the last 30 years that ductwork was installed in the crawl space.
A Okay.
Q You would expect, based on your experience, that there would have been some inspection of that ductwork by the municipality?
A Would I expect that?
Q I am going to represent to you that I -- well, let me back up. Are you aware of any inspections that occurred at the Jones' family residence in the last 30 years?
A I have no knowledge of that.
Q Would you be surprised that there are none on record?
A No, not necessarily.
Q Did you do any analysis to determine when the ductwork was installed in the crawl space?
A I did not.

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Q Okay. In your experience, could you attribute an age to that installation?
A I would have no way of knowing that, other than I would be surprised if flexible ductwork was used extensively 30 years ago.
Q Okay.
A Back in the early 1980s, it is possible it could have been used then, but I do not know.
Q Does flexible ductwork meet code?
A Yes.
Q Is that what you would prefer to see as an installation material?
A It depends on the application. You can't use it within a certain proximity of a heat source, the furnace. You have to come out with a noncombustible material, which is typically galvanized sheet metal for your plenum. Then there are other different applications where having flexible ductwork works well. Other applications where having rigid sheet metal ductwork works well. And arguments can be built either way, pertaining to the air flow through the ductwork and pertaining to heat radiation through the side of the ductwork. So it can be a six to one, half a dozen to the other type of argument.
Q Sure. If you were to render an opinion about the materials that were used in the crawl space, are you satisfied with the use of the flex pipe there or would you prefer to see the

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rigid?
A I think the flex pipe served a purpose and it is certainly easier to install. And so, assuming that it was done to code by a contractor who, if required, did pull a building permit, I would have been satisfied with it.
Q Okay. You have no information one way or the other as to how that material was installed?
A Yes, I have no information on that.
Q Do you have any information as to how the collapse occurred of the ductwork?
A Only our supposition that I did cite in my letter.
Q And that supposition was what?
A That the building sustained a severe shock by the external strike of the house adjacent collapsing against a side wall, and that shock reverberated through the building and jarred many components, but specifically, the ductwork in the basement and some of the piping that is seen draped about the crawl space area.
Q Okay. Let's go through from the point of impact and how that shock reverberated through the building.
A Sure.
Q Where is your understanding of where the shock took place?
A On the south wall of the building.
Q Okay. And where specifically on that wall on the south wall?
A At a mid point on the second floor structure.

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Q So the impact would have been from the inside on the second floor, is that fair?
A No, the impact was coming from the outside somewhere on the south wall's exterior.
Q All right. From the interior, where are you at the point of impact, as far as you understood?
A I think we were -- in one picture that I show of a level showing the south wall to still be plumb, was in the general vicinity of the strike itself.
Q Was that on the first or second floor?
A That was on the first floor.
Q Did you do any analysis of the walls, the measurements of the walls upstairs, second floor?
A Not that I recall.
Q Did you notice any damage to any of the plaster walls, doors on the second floor?
A At different places through the house, and I can't be specific location-wise, we did notice delaminated plaster. And that was just an observation. I can't be more specific as to its exact location though.
Q And in your experience, is plaster prone to cracking and breaking much easier than traditional materials used today, like drywall?
A No. Plaster is far superior, much harder, much stronger.
Q In your experience, how does plaster -- how does the integrity

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of plaster hold up when introduced to moisture?
A Being a harder material, it should last longer than normal drywall would. If it was sustained, you know, sustained exposure to moisture.
Q Did you observe any points of entry for moisture on the exterior of the home?
A Like a hole in the roof? Is that what you mean?
Q Well, my understanding --
A Open window?
Q The roofing materials utilized were incomplete and not totally tied together.
A I do remember -- I do remember something about the roof, but I can't be specific of what that something was. There was -- certainly the house was worn in its condition. I do not think you could look at any one spot in the roof and say this spot in the roof caused the damage to the plaster walls.
Q How about any gable boards that were rotted, did you observe any of those?
A I do not recall.
Q Did you observe any water damage on the exterior of the residence?
A I would not know how to qualify that. It rains on the outside, so I can't say.
Q Did you observe any incomplete workmanship in terms of the installation of the roofing materials?

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A I do vaguely recall that. It was not an issue for me as far as assessing what happened with the building strike, so it wasn't anything that we specifically noted.
Q Is that something that would be code compliant, as far as your experience?
A No, you would want to see roofing done in a proper manner, because it is such a critical component of maintaining the structure of the building.
Q Can we agree that the introduction of moisture into a residence, such as this one, could create the potential for ceiling collapse?
A On a localized basis, yes.
Q Okay. And did you make any assessment as to the nature of the ceiling collapse at the front of the residence?
A I did not, other than to note it.
Q And so in other words, you were not able to attribute the cause of that, other than the fact that it was present at the time of your inspection?
A That is what I did, yes, noted that it was present at the time of the inspection, not knowing when it occurred.
Q At the time of your inspection, do you know if the ground had thawed?
A Yes, it had.
Q And so at the time of your inspection, the frost heave had taken place for the bottom of the crawl space area and there

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was corresponding damage that you attributed to that, is that fair?
A That is fair.
Q All right. Are you able to distinguish between what damage was present at the structure from the frost heave as opposed to the impact?
A No.
Q Did you review the video of the impact?
A Yes.
Q Did that contribute in any way to your opinions that you have rendered in this matter?
A Only as evidence that the impact happened. The video itself isn't real clear and detailed, so it doesn't really provide other detailed information.
Q Did you understand where the security camera was mounted in relation to the damage?
A Yes.
Q Where was that mounted?
A Front of the house, looking west toward the back of the girder of the house on the south side.
Q Was it on the south sidewall that was hit?
A Yes, right up near the front.
Q Would you have expected significant movement of the camera in relation to the strike?
A I don't remember how the camera was mounted, so if it is a

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rigid mount, no, not necessarily.
Q Okay. What do you mean by a rigid mount?
A Well, if it is sitting on a pivot mount that is free to move, then certainly I would expect it to move as a result of the strike. If it is sitting on a hinged connection that is tightened down with a bolt, then I would expect it to survive and not move much.
Q If the house in fact moved at the time of strike, that would be evidence from the camera, correct?
A No.
Q Why not?
A Because the camera is not -- it is not a real clear picture and you don't have anything to gauge the house against to say oh, look at the movement. For example, if you had a tree beyond that you saw just a portion of the tree and then the house moves so that you saw all the tree, then you could say oh, gosh, look the house moved. But you can't say that without a reference point that is static.
Q All right. I know we covered that you can't measure how much pound force --
A Right.
Q -- hit the home.
A Right.
Q But do you have an idea of how the house actually moved at the point of impact?

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A Well, my supposition is that based on the framing method, and in my letter I did go through and explain balloon framing, which is an extremely strong way to frame a building. What I really think happened was when the adjacent structure fell against the house, I think it shifted, went from -- it stayed as a parallelogram is basically what it did. Went from vertical walls, shifted slightly to the north, but then rebounded and came back to the original position.
Q All right. Do you have any idea of how far it would have shifted to the north?
A No, none.
Q And what evidence did you uncover as part of your inspection of the property that supported that opinion?
A Well, it is just an opinion trying to ascertain the way shock would be distributed through the entire structure.
Q Okay. And from the inside, how is that shock distributed?
A Well, you are going to have -- everything is going to radiate outward by the structure, as I explained the nature of balloon framing. Part of what makes it so strong is that it distributes the load across the entire wall as preferred to keeping it as a point voting that would drive through the structure itself. Now, as that load gets distributed, it is still working its way through the structure and it is going to, if it finds a weak point, it is going to do something at that weak point. In this case the weak point would be the

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plaster. As the wall flexes, even a little bit, that shock carries through the plaster and that could have caused the delamination from your base coat of the plaster to the surface coat.
Q Are there any other causes for that delamination other than the absorption of the shock?
A Oh, there probably is. You know, part of it quality of workmanship, could be caused by moisture and part of the freeze/thaw cycle, part of it could be caused by sag of the house which would introduce new forces that can cause separation. Today in a drywall structure, you would see a crack. There, in plaster, you might see localized delamination.
Q My expert used the term -- let me find it -- of course now I can't find it. Diagonal sheer-type cracks. Are you familiar with that in terms of plaster?
A Not diagonal sheer crack, if I -- I understand the term, but I don't know specifically what he is referring to.
Q Did you observe any diagonal sheer-type cracks in the home anywhere?
A I do not recall those specifically.
Q In your experience, training and experience, the nature of the cracking of plaster, is there a distinction that you can draw from how that occurred just by the observation?
A I would not be able to, say, look at an observation and say

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oh, that was caused by. Given a house of this age, I would not.
Q Does the fact that no windows on the south wall -- that none of the windows cracked, broke, blew out, anything? Does that contribute to your opinions at all?
A No.
Q Does the fact that none of the mirrors on the south wall from the bathroom, and I believe there was another one in the bedroom, that that did not crack. Does that contribute to your opinion at all?
A No, all of those are mounted independent really of the structure. I would not expect, unless there was a puncture, I would not expect that to cause damage in those areas.
Q It is not your opinion in this case that the house twisted at all, is that correct?
A You know, given that we didn't sit down and do a thorough analysis, I think the strike occurred sufficiently centerline, so that any twisting would be -- is it a force, yeah. Is it something that could have happened, yeah. Can I speak knowledgeably of that, no.
Q You used the term in your report "severe wallop."
A Yes.
Q Where did you come up with that?
A Watching the video and seeing the plume of dust that came with it, that was a severe wallop.

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Q Okay. Anything else?
A I was surprised at how good the condition of the building was. When Sam and I were driving over there and when we were first talking about the condition we anticipated seeing, we anticipated seeing broken floor joists and girders or supports knocked off of foundations. We were surprised to see that there was no bona fide foundation under the structure, so given the initial construction method, we were surprised at the amount of damage that did not exist structurally.
Q Okay. Did you review any photographs prior to the impact that would have evidenced the condition of the home?
A No.
Q Are you aware that Mrs. Jones claims that the granite countertop was cracked as a result of the impact?
A She may have made that comment, I do not recall specifically.
Q Did you have any reason to question the veracity of that claim?
A It was an immaterial comment to me.
Q Why is that?
A A countertop is a furnishing is the way I would treat that. You remodel your house periodically. You put in a new kitchen. You put in a new bathroom. You change the carpet. Granite countertop is nothing more than an accent feature. That has nothing to do with the structure of the building, so it means nothing to me.

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Q If in fact – let's take that claim and press a little bit further. She claims that the granite countertop was cracked as a result of the September 18, 2012 impact and she vacated the home shortly thereafter, approximately six weeks later. Would you expect to see water damage and evidence of water damage from a cracked granite countertop, assuming those facts?
A On the floor do you mean?
Q Underneath the crack from the bottom of the crack.
A Well, I would have to say where would the water come from? And within just six weeks, I don't think I would expect to see water damage to something like the cabinet itself, unless it was sitting in water.
Q The point I am trying to make is, if water damage is observed in relation to a cracked granite countertop, that would be something that would take much longer than six weeks to manifest itself, is that fair?
A Depending on the material you are talking about, sure. Yeah. I think that is fair. If you are talking about – if you are talking about – let's qualify that. If you are talking about wood being exposed to a freeze/thaw cycle, depending on the number of freeze/thaw cycles in that six week period, could it happen? Sure, I would expect that. If you are talking about wood that got wet then dried out and got wet and then dried out, as long as it is drying out, I wouldn't expect to see a

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lot.
Q Okay.
A But again, you know, given the damaged countertop, I would say that that is a – from an engineering perspective, from my testimony, that damaged countertop has nothing to do with the inspection that I did.
Q All right. The fact that she is representing the granite countertop cracked as a result of the impact, doesn't that cause you some pause to question the veracity of her other claims?
A No, because the other claims – my analysis is based on the observations that Sam and I made, not on her claims.
Q Right. But your inspection, basically confirmed a sagging floor in the closet area and a loose floor joist.
A Um-hum.
Q What about your inspection tied that directly to the impact as opposed to something that preexisted the impact?
A Only Mrs. Jones' – Ms. Jones' comment that it didn't exist before and then it did exist.
Q Okay. Was there anything from your inspection that tied the loose floor joist and the sagging floor directly to the September 18, 2012 impact?
A No.
Q In fact sagging floors in a home of this age is relatively common, isn't that fair?

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A Yes, it could be.
Q And can we agree that the level of maintenance inside of this home was less than satisfactory?
A Well, that is a – I am not sure whether you are boxing me into a corner there. It is not – the house is not maintained in the condition that I would maintain my house, I am willing to say that. But I have seen other people living in houses a lot worse.
Q How about the standard that you would employ in connection with residential inspections?
A Well, residential inspection is based on current work, not preexisting conditions.
Q Okay. Do you know who made the decision to force Mrs. Jones to move out of the residence?
A I wasn't under the impression that she was forced to move out.
Q Okay. Did you do any analysis to determine whether or not the heating elements were functional?
A No, we could not do that.
Q Okay. So in terms of whether or not the furnace was functional, you have no idea one way or the other?
A No, the gas was turned off, so we would have no way of knowing that.
Q Do you have any criticisms in the manner in which the furnace was installed?
A Only from a personal preference type of thing, not so much

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from a building inspector's perspective. Sometimes – oftentimes when you go into homes where you are dealing with homes in a lower socioeconomic area, you see workmanship that is done in a manner that I might not like. If it is done to code, then it is not so much a case of whether I like it or not, it is a case of whether it is done to code. In the case of a furnace, it would be the responsibility of the mechanical inspector to approve the installation of the furnace. That is a totally separate license than the license that I carry.
Q Okay. Did you attribute any cause of that as to why the doors would not close?
A Well, what I believe happened there was simply the house getting racked out of shape by frost heave, and as a result of the house heaving and of particular notice on the first floor that would cause doors to not be able to close correctly.
Q Did you make any determination as to when exactly the frost heave took place?
A I would have no information there, because I didn't observe – I didn't first look at the house until after the frost had left the ground.
Q At the time of the impact in September of 2012, can we agree the frost heave had not taken place?
A Yeah, it would not have occurred then.
Q Okay. And so in your opinion, the doors would not have been compromised at that point, is that correct?

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A That is correct.
Q All right. Did you observe any efforts on behalf of the homeowners to patch previous cracks in the plaster?
A None that I know of, no.
Q Okay. Did you have any criticisms of how the foundation was supported in the crawl space?
A Yeah, a lot of them, just because it does not meet current building code in any capacity.
Q And I am sure it is hard from your perspective to separate those two, considering that this preexisted the code requirements that are current. But in terms of how that appeared to you, was that structure supported properly?
A Yeah. I thought it fascinating. I actually, given the detail we have put into our building code nowadays requiring foundations to be below grade, requiring the removal of -- I am sorry, I said that wrong, requiring foundations to be below the frost line is what I meant to say, requiring that material that, you know, will heave in a freezing condition, loamy soil, our building codes are very explicit. And so when I went to look at this house, I think I was told it was about 150 years old. To see the way they did construction back then, to see the quality of the material and workmanship that existed and to see the way this very large house was built off of nothing more than piers positioned through the basement area I was -- I found it quite fascinating.

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Q Can we agree that had the gas remained turned on for the winter 2012/2013, the frost heave would not have taken place?
A Had the furnace been left running?
Q Yes.
A Well, provided that there was sufficient air movement getting down into the crawl space so that it would keep the ground from freezing, yes, I would agree to that certainly.
Q And do you recall the type of duct hangers that were used in the floor joists?
A Not a lot. I remember seeing some tie wire hanging around. I do not recall a lot in the way of sheet metal hangers screwed into the ductwork and screwed into the floor joists.
Q Did you do anything to prepare for your deposition today?
A I went through my notes and looked at that. That was about the extent of it.
Q In terms of the opinions that you expressed in Exhibit 1 from the Hudson deposition, is there anything from that report that you have found to be inaccurate or that you would change or amend today?
A No, I think that very well expresses my opinion on the whole subject.
Q Is there anything else in terms of your retention in this matter, that you feel you require additional information or that your inspection is not complete?
A No, I think it is complete, given what I was retained to do.

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Q Okay. I have no further questions for you. Thank you.
MS. LUSK: I have no questions.
MR. ELLISON: I reserve my questions for trial.
BY MR. MAIR:
Q Let's go back on the record I referred to them. Mr. Martlew we are going to do some tying up here.
A Okay.
Q I have marked here as Exhibit 3 an e-mail that you sent to Mr. Ellison. Is that a fair and accurate representation, Exhibit 3?
A It is my e-mail dated April 5th, 2013, 7:30 a.m.
Q That was your e-mail to Mr. Ellison, is that correct?
A Yes.
Q Then Exhibit 4 is a copy of your field notes that were reduced to Word format in your report, correct?
A Yes.
Q Okay. I have no other questions.
(At 12:17 p.m. deposition concluded.)

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* * * *

CERTIFICATE

STATE OF MICHIGAN)
)
COUNTY OF BARRY)

I certify that this transcript consisting of 41 pages, is a complete, true and correct record of the testimony of Walter Martlew held in this case on January 14, 2014.

I also certify that prior to taking this deposition, Walter Martlew was duly sworn to tell the truth.

January 17, 2014

_____
Signature

MARY B. HOWLAND, CSR0078, CM
141 East Michigan, Suite 206
Kalamazoo, Michigan 49007
1-800-878-8750
My commission expires:
5/12/2019

* * * *

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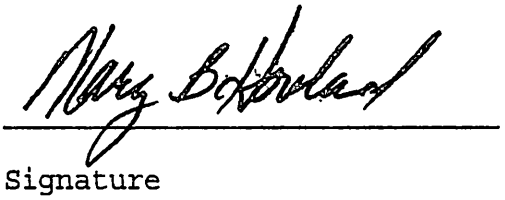

Signature

MARY B. HOWLAND, CSR0078, CM
141 East Michigan, Suite 206
Kalamazoo, Michigan 49007
1-800-878-8750
My commission expires:
5/12/2019

COPY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

JONES FAMILY TRUST, SYLVIA JONES
& BOBBY JONES,
Plaintiff,

vs.

Hon. ROBERT L. KACZMAREK
CASE: 13-019698-NZ-2

SAGINAW COUNTY LAND BANK
AUTHORITY, CITY OF SAGINAW,
ROHDE BROS., EXCVATING, INC. and
HARDHAT DOE, an unknown employee,
Defendant.

_____/

DEPOSITION OF SAM HUDSON

Taken by the Defendant on the January 14, 2014 at the offices of O'Brien and Bails, 141 East Michigan Avenue, Kalamazoo, Michigan, at 10:00 a.m.

EXHIBIT
3

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APPEARANCES:
For the Plaintiff: Mr. Philip L. Ellison (P74117)
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989/790-2500

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REPORTED BY: Ms. Mary B. Howland, CSR0078, CM
Certified Shorthand Reporter
800-878-8750

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Kalamazoo, Michigan
Tuesday, January 14, 2014 - 10:00 a.m.
(At about 10:00 a.m. Exhibit 1 was marked)
REPORTER: Do you swear or affirm the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: I do.
SAM HUDSON,
(At 10:05 a.m., sworn as a witness, testified as follows)
EXAMINATION
BY MR. MAIR:
Q Is this is the time and place set for the discovery only deposition of Sam Hudson, taken pursuant to notice under the Michigan Court Rules.
Mr. Hudson, my name is Greg Mair. I represent the City of Saginaw and Rohde Brothers in an action that's been filed by the Jones Family Trust, Sylvia Jones and Bobby Jones. I'm going to ask you a series of questions here this morning. If at any time you don't understand my question, please ask me to rephrase it. Okay?
A Okay.
Q In the process of doing this, I will ask if you can give verbal responses so the court reporter can take down what your responses are. If I remind you or ask you if that was a yes

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or no, I am not picking on you, I just want to make sure we have your answer here on the record.
A Understood.
Q Can you state your full name for the record, please?
A Samuel Earl Hudson.
Q And you go by Sam?
A Yes.
Q And what is your professional address?
A Benton Harbor, 580 Territorial Road.
Q And what type of business is that in 580 Territorial Road?
A Construction, residential building.
Q Okay. So you are a residential contractor?
A Yes.
Q Is that like a general contractor?
A Yes, it includes general, maintenance, alteration, residential building.
Q All right. And I take it you have a builder's license?
A Yes, I do.
Q When did you obtain your builder's license?
A 1992.
Q And do you have any – or what is your educational background?
A Masters degree business administration, Western Michigan University.
Q Okay.
A 1977.

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Q Okay.
A I have been involved in the construction business since I was young. My father was a builder.
Q What is the name of your company?
A Champion Housing.
Q Are you the principal owner of that?
A Yes, I am.
Q Do you have any partners?
A No.
Q How do you know Barney Martlew?
A Barney and I have been associated for years. Actually he was construction manager. I met him as a construction manager in the building trade.
Q Do you two work together often?
A Yes. We have worked together in the past. At one point we were involved in some component fabrication, and that was our first working together, more or less for residential construction.
Q I have no idea what component fabrication is.
A Building Lego parts to a building so you compartmentalize the building. Building the parts allows you to take it to the site and reconstruct.
Q Okay. And you have offered yourself as an expert witness in this case on behalf of the Jones Family Trust, the plaintiffs in this case, correct?

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A Yes.
Q Have you, as part of your business, do you do expert consulting?
A Yes. Assessment, inspections, along with the construction end, rehab.
Q All right. And how often do you do expert consulting on those types of engagements?
A In the last three or four years, maybe two or three times a year I am requested for inspections or assessments of that nature.
Q All right. How about expert retention in the context of civil litigation such as this, how often have you done that?
A Not often.
Q Okay. Can you quantify that?
A Once in the past.
Q How long ago approximately?
A About four years.
Q What type of case was that?
A It was a case where an individual had an addition on a house in some form or fashion, the house wasn't finished and then there was a case as to, you know, point of completion. Some of the workmanship was bad. So they needed someone to quantify what it would take to remove and replace, bring it up to code.
Q All right. Was that -- did you offer your services on behalf of the plaintiff in that case?

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A Yes.
Q Did you have to testify either by way of deposition?
A No.
Q Like here today?
A No, just prepared schedules.
Q Have you ever testified in trial as an expert witness?
A No.
Q Do you know if you have ever been qualified by any court as an expert witness?
A No, not that I can specifically say.
Q Have you ever given sworn testimony on any occasion?
A Yes.
Q All right.
A It is more or less in response to a civil case and that was about it.
Q Was that involving yourself?
A No, an employee of mine.
Q Have you ever been a party to a lawsuit?
A Other than that case that I am referring to for my company and he was sued, which was, you know, ultimately dropped.
Q You mentioned that you do assessments and inspections. Do you hold a certification that qualifies you to do those?
A Builder's license.
Q Okay. Anything else beside the builder's license?

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A No.
Q All right. And who are you doing those inspections for?
A Private owners.
Q Okay. Why would a private owner hire you to do an inspection?
A Well, if they are interested in investing in a building, they don't feel that they are capable of, you know, being able to indicate the soundness of the property.
Q These are prepurchase inspections of homes?
A Yes.
Q Do you do any commercial work?
A No, very little.
Q What is your hourly rate?
A My hourly rate is $140 an hour. And then it varies depending on if I have to bring in other trades, architects, engineers.
Q In connection with this case, has your hourly rate been $140 an hour?
A Yes.
Q Do you know how much you have billed to date on this file?
A Probably somewhere close to four or five thousand. I would have to look back.
Q Does that include your services only or does that also include Mr. Martlew?
A Everything, yes.
Q So you think your bills on this are between four and five thousand dollars?

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A Somewhere in that area.
Q Your appearance here today is being billed at $140 per hour, is that correct?
A I believe so.
Q We can go off the record real quick.
(At 10:17 a.m. off the record)
(At 10:18 a.m. on the record)
Q All right. We can go back on. When did you first have any contact with anyone affiliated with the plaintiff, either the plaintiffs, their attorney, about the 339 South Fifth Street address in Saginaw?
A This was probably about a week or two before actually making the trip up to conduct the inspection.
Q Okay.
A Which was in March, April, I think, of last year, 2013.
Q Do you know who contacted you?
A Mr. Martin.
Q All right. Do you know who had contacted him?
A I believe it was either the plaintiff or plaintiff's attorneys.
Q Okay. Prior to -- let me back up here. You actually went to Saginaw to inspect the home?
A Yes. Yes.
Q Prior to that had you had any contact with the plaintiffs or the plaintiff's attorney directly?

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A Never.
Q During your inspection, did you have any contact with the plaintiffs or the plaintiff's attorney?
A The plaintiff's attorney. Basically we had contact with them.
Q What did he share with you?
A The fact that there was an inspection or an assessment required on a particular piece of property, a two story residence, which was the Jones' residence. And the primary concern was that Mr. Jones had about the structure of the residence and some problems that she was incurring as to the habitability and occupancy.
Q Now, at the time that you actually inspected the property in March, April of 2013, do you know if the ground was still frozen?
A There was moisture, but I think the ground was more or less fall was evident. It wasn't completely frozen.
Q Okay. And did you have an opportunity to take a look at any pictures, video, photographs of anything prior to April, March of 2013?
A No, other than the fact that the home had suffered some damage as a result of a possible demolition next door was about the only information I was given.
Q Okay. In terms of your qualifications, you are not an engineer, correct?
A No.

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Q Okay. And so really, your retention in this matter is to, correct me if I am wrong, take a look at the structure and give an opinion as to how to fix it, is that fair?
A Exactly.
Q You're not necessarily there to determine how or why something happened. It is diagnose the problem here and this is what we need to do to fix it. Is that a fair representation?
A That would be a fair assessment. And there was specific concern as to the damage, the obvious failures in the foundation, heaving floors, doors that won't shut, those types of things that will occur.
Q And again, those specific concerns, you're not qualified to give an opinion as to how those happened, you're just there to diagnose the problem in terms of the door won't close and this is how you fix it, is that fair?
A Yeah. I think – no one can ever say why anything happens. You can say with preponderance of the evidence with the results this is what caused it.
Q The specific concerns that were shared with you were doors that would not close, correct?
A Yes.
Q What were the other ones?
A Floor was heaving, warped. There was a front portion of the house that had a substantial lean to it. Obvious physical problems that would be readily observable.

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Q All right. Can you describe those obvious physical problems that you observed at the property?
A Yes. As I say, from the interior, there was a noticeable slant to the front foyer. There was a huge warping of the floors. There were doors that would not close.
Q First floor? Second floor?
A First floor. These are all first floor.
Q Okay.
A There was, as expressed, a lack of heat.
Q Okay. And that was something that was represented to you, correct?
A Yes.
Q Did you actually run the heating system while you were there?
A No, the utilities were not -- were not on.
Q All right. What was told to you about the lack of heat?
A That one of the problems that plaintiff was having was, for some reason, you know, along with these other obvious physical conditions, not getting any heat.
Q Okay.
A And so that was something that we figured would, you know, should be also looked at. And we found out, evidently, once we got to under the house, what those problems were.
Q Okay. Anything else in terms of physical problems inside of the structure that you recall observing? And I have a copy of the report, if you want.

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A Like I say, other than the floors heaving, sloped floors, doors that wouldn't close, things of that nature, cracks in the plaster.
Q Can you describe those?
A Yes. There were significant cracks in the front, the front door, probably as a result of the -- once the floor takes a lean at the bottom, everything up top has to provide space to accommodate that. And so that is generally the source of cracks where you have structural failures.
Q Were any of those physical problems things that you could attribute to wear over time, based on how the structure is designed?
A Every structure is designed to, at some point in time, go back to the earth. I think that this house was over a hundred years old. I don't think that normally, you know, you would expect to find those things, other than, you know, in casual manner, a crack from time to time.
Q Okay.
A A lot of that is just depending on soil movement, you know. Are you close to a main road, things of that nature. So you find larger houses on the balloon framing, conditions, if they are on a main road you probably experience more cracks. If not, you may never even see one.
Q In your experience as a professional in residential building, do you notice that plaster is prone to cracking?

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A Oh, yes.
Q More so than drywall or other commonly used materials now?
A Plaster is more prone to cracking because of its inherent properties, you know. You slat it, and so yes, different temperatures. In many cases if a home has been, you know, plastered and left vacant for a number of years, just the normal, you know, freeze/thaw from the ambient temperatures, moisture that collects, you probably expect to find some cracks just due to the substrate.
Q Now, in the entry, the main floor area, there was plaster from the ceiling that had actually fallen.
A Yeah, there was some plaster from the ceiling that had fallen. There was a crack in the corner.
Q Did you actually go up and inspect that area?
A Well, we didn't put a ladder up there, but we could see it was a lateral crack. And right away you start wondering, well, what is moving. And we noticed after we got under the house that there were some problems with the front porch area.
Q Did you notice any moisture around that area?
A There had been some leaking, yes.
Q Moisture on to plaster would contribute to its destruction and integrity being compromised, is that fair?
A Most definitely. If the weather is, you know, conducive, wants -- in most cases once you have a crack that allows moisture to infiltrate, wherever moisture infiltrates, if it

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meets anything that is of biomass state, wood, or something of that nature, it begins to absorb the moisture and then it is your freeze/thaw, that expansion and constriction that generally contributes to it.
Q Did you notice any areas on the outside of the structure that would allow for entry for moisture?
A No, not really evident.
Q Did you inspect the roof at all?
A No.
Q Did you actually -- you didn't go up on the roof, did you?
A No.
Q Did you notice any exposed wood on the outside rotting or evidence of moisture entry there?
A No. There was a piece of, I think OSB that was located next to one of the crawl spaces that was deteriorated. But other than that, no. It was a vinyl sided house.
Q Do you have any idea when that siding was installed?
A None whatsoever.
Q Did you ever meet with Mrs. Jones?
A Yes.
Q And when would that have been? Was it the same day as the inspection?
A Yes.
Q How --
A When we arrived.

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Q I am sorry, I cut you off.
A When we arrived.
Q What did she share with you?
A Well, she shared with us what she thought were problems with the home and the fact that she had been told by a building professional that the house was uninhabitable and she should not be occupying it.
Q Did she share with you the identity of that person?
A No, she didn't.
Q As part of your retention, did you have any need to make contact with that individual?
A No. Everything that we needed was right there on-site.
Q Sure. At the time that you were present on the site, in your professional opinion was the house uninhabitable?
A Yes, I think so.
Q And I guess what observations did you make that supports that opinion?
A Oh, the fact that you had obvious foundation failures resulting in, you know, the cracks, floors heaving, doors not shutting. In most cases you've got 3/16th margin in a door, so you are able to move that distance in any direction. Anytime you increase that, then you are going to have doors that will not close and so forth. There was also a collapse in the floor in the front bedroom. And those were the things that, probably when the builder went in looked at them,

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probably took a look under the underside and said, hey, you know, this is not a safe structure to be occupying.
Q All right. Did you examine the heating elements on the first floor?
A Just from a visual.
Q Okay.
A What we were concerned was how they were being actually fed, which is ductwork-related.
Q We will talk about that in a second. In terms of the actual furnace, do you have any criticisms about the installation of that mechanism on the first floor?
A No, never even went through and looked. There was no utilities on, you know, it was not operating so.
Q From your observations, did you render any opinion as to the efficiency of the heating mechanisms as you observed on the first floor?
A As far as their ability to provide the heat?
Q Yes.
A No, other than the fact that upon installation it had been sufficient and so there would be, you know, some reason for it to fail.
Q Where did you reach the understanding or opinion that the heating element when it was installed was sufficient?
A The fact that there was no problem. After this occurrence, then one of the problems that she was having was not getting

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any heat, insufficient heat.
Q Did you do any analysis whatsoever in terms of the utility usage, both prior and after the impact?
A No.
Q Okay. So if I understand you correctly, you took the representations from Mrs. Jones and her representatives on its face value and then did your inspection based on that representation?
A Exactly. She says that it was not providing heat so.
Q Now, in terms of your examination of the ductwork, do you have any criticisms about the installation of those – the ducts, the connections, the vent, any of those?
A No criticisms on the system itself as far as the installation. Main problems were the ductwork was flex, insulated. It had collapsed. When it collapses, it is not properly supported, it pinches itself off kind of like pinching a hose or vessel. And that is what we found in a couple of the heat runs, they were just, you know, collapsed, unsupported. And as a result, they collapse, there is no forced air.
Q Okay. And would you say that was a total system failure underneath the crawl space?
A I would say for a couple of those runs that, yeah, would definitely cause you to not give the proper heat at a distance.
Q Did you observe any supports that were in place for those

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systems where they had in fact collapsed?
A Yeah. There had been a couple – there had been some hangers.
Q Can you describe those?
A Strapped.
MR. ELLISON: Strat?
A Strapped.
MR. ELLISON: Oh, strapped, I am sorry.
A Hangers. But they were broken loose.
BY MR. MAIR:
Q Are you familiar with any of the code requirements for installation of ductwork in a crawl space?
A Generally, as a licensed builder. Mechanical trade are licensed themselves. So builders for construction, the actual HVAC personnel would have the mechanical license. And it would be my assumption that they would be the most reliable source. But in most cases, anytime you use flex duct, it has to be properly supported throughout the run.
Q Was there ever any evidence, as far as you could tell, that that ductwork, that flex ductwork was ever properly supported, based on your understanding?
A I would only be able to report based upon what the homeowner had reported, which was everything had been working fine, no problems, and upon having this demolition of the building next door and the collapse into her property, she started having these problems.

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Q In addition to her representation though, you actually had a chance to go in the crawl space, correct?
A Yes. Yes.
Q And you observed various runs that were on the ground?
A Yes.
Q Resting on the ground, correct?
A Yes.
Q Were you able to determine, looking up into the floor joists, that the proper support systems were in place for that ductwork at one time?
A Yes. What I saw were some broken hangers, a couple wires. And my major belief was that it would be that if these runs were not properly supported upon installation, then probably some inspector or someone would have noticed it and you would not be getting heat from the onset, you know, from the beginning.
Q Are you aware of any occasion when the ductwork underneath the crawl space was ever actually inspected by anyone from the City of Saginaw?
A I have no knowledge of any.
Q I am going to represent to you that it was never inspected.
A Oh.
Q With that understanding – with that understanding, reconstructing how that ductwork would have been prior to collapse, is that something in your professional opinion would

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have met code?
A As I saw it, it would not have met code.
Q Okay.
A It collapsed.
Q Assuming that the flex ductwork was properly supported from the hangers that you saw there?
A Oh, yes. Yes.
Q That would have been code?
A Yes.
Q How about the connections to the ductwork into the floor?
A Those I cannot say specifically about those connections. But here again, I would assume that if the owner was, you know, satisfied with the heat that they were receiving with the system, it was probably connected.
Q Have you been provided with any expert reports that the defense has received in this case.
A No.
Q I am going to show you a photograph from that report, I just want to ask you, I am going to represent to you that this is a photograph from the crawl space area. This photograph was taken by the defense expert, Doug Rettinger.
A Um-hum.
Q Now, my understanding what this photo represents, and you can -- I am just trying to make this a little more efficient. This is a metal plate with the hole cut in it where the flex

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ductwork would have been attached to it, correct?
A If it is in use or was in use, it should have been connected.
Q Now, ideally this plate would have some type of metal receiver where it would actually be hanging duct, correct?
A Yes.
Q That is how the standards are for attaching ductwork into the floor joists would normally be done, correct?
A That is usually the case.
Q You don't see that on this photograph, correct?
A No, I don't.
Q All right. And also there is duct tape that is used that may have been used to attach the flex duct pipe on the ground here to that metal plate, do you see that?
A Yeah, it looks like it -- is this duct tape that I see hanging here?
Q Yes.
A Um-hum.
Q Now, can we agree that that is not the proper way to attach a flex duct pipe to the metal receiver here?
A As I say -- said earlier, I am not an HVAC man, but in my professional expertise I don't think that would be acceptable.
Q Okay. And in fact, based on your professional experience?
A From what I have seen?
Q Doing inspections.
A I don't think that would be acceptable.

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Q All right.
A I am not speaking for any HVAC inspector out there, but as a builder.
Q Can you tell me why you believe, in your experience, that this is not an acceptable method of connecting ductwork to a receiver?
A Improper connection.
Q Can we agree that that is prone to failure?
A Oh, I would say most definitely.
Q Can you, from looking at either of these pictures, and I do have some others, we will kind of keep these in order so I don't get it out of order. Can you identify from any of the photographs here from Mr. Reckenger's report where the broken hangers were for the flex duct pipe in the crawl space?
A They were off of the joist.
Q Okay.
A Off of the joist connections. I think some were similar to, you know, to these wires.
Q Did you take any measurements about how far apart they were --
A No.
Q -- in the floor joist?
A No.
Q Did you make any observation as to the age of those hanging brackets in terms of oh, that is something that looks really old, that is something that looks fairly new, based on your

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experience in the industry?
A In my I experience in the industry, if you have flex duct, it is not hundreds of years old. So that is a relatively new installation. But I couldn't say exactly what the date is.
Q A better material to use in that crawl space would have been hard pipe, correct?
A Oh, I think so.
Q Okay.
A I am not an HVAC contractor or an engineer that does the design work, but I have always been a firm believer of rigid.
Q Sure.
A No, that is not --
Q If this was your house, would you have that flex pipe in the crawl space?
A Personally I don't like flex. But I don't like PEX either, and that is the way all mansions are built. So it is just my own old school, I think, professional desires.
Q Why is that?
A I have always believed in the old adage that overkill is the best way to err in the building business. So to me, something that has more rigid form, it just gives better wear. I believe in copper versus PEX. And most people will tell you right now, no, we are not doing it. But if you ask me, I say run the copper. It costs more, but over time it pays for itself. And so it is just overkill. But like I say, it is

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legal when properly engineered, you know, PEX works fine. I see million dollar houses with PEX. And to me, it is just -- and every plumber tells me the same thing, oh, this is even better. But it is just something in my head that says, wow, that soldered joint with copper just is worth its weight in gold. And there is nothing wrong with PEX, everybody is using it.

Q Sure. In that regard, this crawl space was free of copper?

A No copper. PEX or PVC actually.

Q Which would indicate to you, that over time it had been replaced?

A Yes. Oh, most definitely.

Q Did you render an opinion as to approximately when that may have been replaced in terms of five years, ten years, 30 years?

A No. Our primary concern was to ferret out structural problems, foundation problems that were resulting, causing, resulting, floors, doors, slopes in the floors and things of that nature.

Q Okay. Which doors, as you can recall, were off on the first floor?

A All the doors on the first floor. Every door we tried to open and shut basically was stuck, unable to close. And toward the center of the house, those were -- and that is generally where you had the most problems.

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Q The center?

A Yeah. You know, everything tends to be weaker in the center and so you just have more movement.

Q Did you make any observation as to the quality of workmanship inside the home?

A Generally there were come construction that seemed like was going on, but we weren't there for making those types of inspections. But there was some workmanship that I think in an older home that probably could have been tighter.

Q In terms of workmanship and the quality of workmanship inside of the home, is it your belief that any of those failures to, I don't know, have a quality job done, would contribute to the door closing issues or the slanting of the floors or the compromising of the plaster?

A No. I think that those were all put in place years ago and those doors were, you know, they have been there for years and closing. Why are they not closing now?

Q Did you make -- how did you find out where the impact actually took place?

A Plaintiff indicated it was the sidewall of the house adjacent to the home being torn down that had actually been struck.

Q Have you rendered any opinion as to, at the point of impact, how the house moved, if at all?

A Other than the fact that with balloon framing you generally have lateral rows that resist an impact from the side, that

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tend to transmit. And there is a, I think a lot of flex in the building. It was a pretty sturdy built building from what we noticed. I mean two by sixes were real two by sixes. Two by tens were real two by tens. And you generally get a sturdier, more firm structure. It is just tighter loads. So with any of that flexing, loads, force, that is the basis of any movement.

Q Are you able to provide any opinion as to how the house flexed at the point of impact?

A No, other than the fact that it had to be away from the force. Which, you know, energy had to move away from the point at which it was struck. And I think that from a professional standpoint, there is some possibility of, you know, flexing that would affect the home. Once it is flexed off its foundation, and you can tell there had been some previous warp, it is just hard to say that, you know, exactly those all have an affect.

Q Sure. Did you render any opinion as to how far the house flexed in terms of inches, feet?

A No.

Q Do you have any idea how far the house flexed or moved?

A No, but I think engineering-wise we can identify the amount of stress that it would take to create a breakage just based on, you know, load, size and dimension of lumber, so forth.

Q Is that something that Mr. Martlew would do?

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A Yes.

Q Do you know if he has done that in connection with the Jones' family residence?

A No, I don't think he pulled the actual load calculations. But I think we both agreed upon our assessment that there is a possibility -- well, we know that with a home of that nature, severe, blunt, lateral force does nothing to stabilize. It can only be a destabilizing affect.

Q Sure.

A So that was more or less where we concluded.

Q In terms of the condition of the foundation at your inspection, what did you observe?

A Well, we observed the foundation being continuous at the rear of the house. As we moved around on the interior, there were masonry unit pilasters which were supporting the girders on which all of our floor joists were actually located. There seemed to be some, you know, some problems with those pilasters?

Q Okay. All of them? Half of them? Some of them?

A Majority of them.

Q And what was the issue exactly?

A That there had been some movement and that movement resulted in a weakening of the structure, that those pilasters had been installed after original construction. Shims were installed. As a matter of fact, we noted that they were of the original,

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you know, wood from the original construction. So we concluded there probably had been some replacement of those pilasters. And not being able to have been there when it was conducted, we looked at a couple of them, they were not properly -- there was only, you know, four or five inches of soil and that loamy soil, we believe with freeze and thaw, there was possible movement, settling.

Q Okay. When the home was vacated, I believe in November of 2012, had the utilities been maintained, can we agree that most likely the frost heave would not have happened?

A It definitely would have assisted in the prevention.

Q Okay. And is it your understanding that the majority of the damage that the residence at issue here incurred, was due in part or as a result of the frost heave?

A I would concur that frost heave probably played a part. But over the years, you know, our position was what has the history been. There had never been any problems. And so the fact that there had never been any problems indicates that the system must have been, you know, working or intact.

Q Sure.

A Upon this particular incident, you started having problems. Whether these would have occurred without that particular incident is probably something I don't think that one can say with specificity.

Q Okay.

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A But it doesn't help to have heaving from a freeze/thaw and hydrostastic pressure problems.

Q Okay. Did Mrs. Jones share with you when the -- when she first observed the doors not closing?

A She indicated, to my recollection, that it was after this incident where her house was struck by the demolition of the house next door to her.

Q Did she say how long, in terms of it was immediate, a week, a month?

A I don't recall her giving a specific time. Everything simply was, you know, following this incident.

Q Did she share with you any information about complaining to anybody about the fact that after the impact her doors would not close and the floor was slanted?

A All I recall is her indicating that she had a problem and that I guess the contractor and the city, you know, had been made aware.

Q And you don't have any further information about that?

A No. We were simply there to assess and make some inspections.

Q Approximately how long did it take for you to complete your inspection on-site?

A Oh, probably about three, four hours.

Q Did you take any photographs?

A Yes.

Q Do you know who has retained those photographs?

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A They should be in the files for Barney and I am sure there is probably a copy floating around somewhere.

Q I am going to hand you what's been marked as Exhibit 1. You can take a minute to review that. I believe that is a complete copy of the expert report.

A Yes, this looks like it.

Q Which is eleven pages in length.

A Yes.

Q And my first question is Appendix A details a series of photographs and descriptions.

A Yes.

Q Are those the notes that Mr. Martlew would have in his file?

A Yes?

MR. MAIR: Have you are provided those separately?

MR. ELLISON: Can we go off the record here?

MR. MAIR: Yes.

(At 10:53 a.m. off the record)

(At 10:54 a.m. on the record)

BY MR. MAIR:

Q Back on the record. Appendix B indicates field notes and a transcription of what those field notes are in Word format.

A Yes.

Q Were any of those notes from your on handwriting?

A No, most of them were from Barney.

Q Did you retain any handwritten notes from this inspection?

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A No.

Q Okay. In terms of preparation of Exhibit 1, the expert report, what contributions did you make to this?

A Actually suiting up, making the call. I was the one actually under the crawl space.

Q Did Barney go in the crawl space?

A Yeah. Only -- but he only went in, you know, about four or five feet.

Q Engineers are smart.

A Well, I mean not smart, because I know engineers and architects too. They suit up and do the tight wire work.

Q Okay.

A It was a job for two persons. One person outside. So I did the actual crawling.

Q Did you take any video?

A Pictures.

Q Okay.

A Stills.

Q No video?

A No video.

Q Did you review any video?

A I recall after the inspection we reviewed a video that the owner had captured from some security camera which showed, you know, the side of the house being struck. Other than that, no.

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Q Where was that security camera mounted in relation to where the impact took place, as far as you can recall?
A To my recollection, it was on the side of the house where the strike actually took place.
Q In relation to elevation, was that security camera at about the same level of the impact? Above the impact.
A I think it was up on the building.
Q Same side of the building?
A Correct.
Q In your professional opinion, would you expect that camera to move if the house flexed at the point of impact?
A Oh, definitely. It is attached to the house.
Q Do you recall in your review from the video whether or not there was any movement whatsoever noticeable to you from the camera?
A No, not that I can recall.
Q Why don't we take a look at it real quick. What I am showing you is the surveillance footage that was provided by the plaintiffs.
A Um-hum.
Q Now, that footage right there, is that the footage that you reviewed?
A Yes.
Q Did you notice any movement in terms of the camera at the point of impact?

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A None.
Q In your professional opinion, based on your observation, wouldn't you have expected if the house moved laterally, that that camera would have had some noticeable movement?
A I would expect, sure.
Q Taking that one step further. Is it not possible that the house did not move at all at the point of impact?
A Possibility is always, you know.
Q Going back to your report, in terms of the preparation of Exhibit 1, can you identify the areas that you contributed to the actual written materials that appear here?
A Yeah. Everything that was included here was more or less Bernie took the notes, you know, I did the physicals, took the pictures. And as he prepared his notes, he asked me and I would respond appropriately. "Is that level, Sam? Yeah, that is level. All right. Do you have any movement to the lateral? Yeah, there is movement to the lateral." So my contributions were more or less to the preparation and then a review.
Q So you actually got a copy of the expert report to review?
A Yes.
Q Did you make any changes to that?
A No.
Q And so Mr. Martlew would have been primarily responsible for putting out the actual expert report that appears in front of

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you as Exhibit 1, correct?
A Yes.
Q And you concurred in that opinion?
A Yes.
Q Correct?
A Yes.
Q Is there anything from that report that you disagree with?
A No. I expressed to him -- let me say this. He wanted to know if that included or if I had anything else. I said no, I think that says everything.
Q Is the -- now, I need to find it. Be on page four at the top under assessment, there is a notation there on the second line about the severe wallop. Are those your words or Mr. Martlew's?
A Mr. Martlew's.
Q Okay. Based on your review of the video, is that your opinion, there was a severe wallop to the house?
A Sure.
Q And has anybody, as far as you understand, done any analysis as to the pounds of pressure or pounds of impact onto the structure and how that may have impacted it?
A No. I did no, or completed no study of force analysis or load.
Q What damage did you observe to the exterior of the house?
A Other than the fact that she had loose rim joists and so

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forth, siding and everything was intact. And you would not be able to tell, just from looking at it, that it had been under some contact.
Q Okay.
A But here again, with most balloon framing, which is from base, from soil to top, you have pretty solid structure with the two by four walls, it is a pretty good system when it is all intact and working together.
Q Have you been retained in this matter to give any opinions as to cost of repairs, cost to rebuild, anything of that nature?
A No.
Q Have you done any analysis of that independent of your retention in this matter?
A No. But I would assume that to rebuild that particular piece of property or to repair it from the condition that it was in would be relatively exorbitant.
Q Can you quantify that at all?
A Yeah. I would think that you would probably be upward of a hundred thousand dollars to really try to jack a structure like that up and provide the current code foundation. You know, you are talking about some bucks.
Q In your opinion, is this home a total loss as it stands right now?
A I wouldn't try to save it.
Q You would not?

A No. I think that the cost -- you know, the cost to save it would probably be exorbitant. I mean because you are working with, you know, tight crawl space. You have a tremendous amount of work involved in just providing foundation support. I think that -- I mean anything, you know, you can save the Taj Mahal, but --
Q Economic reality, as far as you are concerned --
A I don't think so.
Q -- would support tearing the structure down and rebuilding?
A That would be my suggestion. As a professional I would not suggest to that homeowner, you know.
Q Are you aware of the 339 South Fifth address ever being condemned by any official from the city or any other person in authority?
A I am not aware. I don't think -- I was not told directly that it was condemned. And usually when most building officials condemn a property, by law they are required to post public notice.
Q Sure.
A And so I would think that a person removing that public notice would realize it is a crime. So we saw no evidence.
Q Do you have any idea how the ductwork in the connector points were torn loose?
A No, other than there was not sufficient fastening. And anytime you have that insufficient fastening, your connection

is no good. And that is usually the weakest part of any component system, connections.
Q Okay. I have no other questions for you. Thank you Mr. Hudson.
A You are welcome.

EXAMINATION

BY MS. LUSK:
Q I just have one question for you, Mr. Hudson. My name is Amy Lusk, and I am here on behalf of Saginaw County Land Bank Authority. On page six of the report that has been marked as Exhibit 1, in the second paragraph, it says: "Lastly, very strange damage is evident on the west gable of the two story portion." Can you describe what that very strange damage was?
A The west side, I believe would be -- I am assuming that that is the front, the front gable where we noticed that it was leaning at the front of the house, if I am not mistaken to my recollection.
Q How did you find that to be strange?
A Well, you look at it, you could see, you know, the front is obviously not square and level. So just through visual observation.
Q I have nothing further.
MR. ELLISON: I am going to save my questions for trial. Thank you.
MR. MAIR: All set.

(At 11:06 a.m. deposition concluded.)

* * * *

CERTIFICATE

STATE OF MICHIGAN)
)
COUNTY OF BARRY)

I certify that this transcript consisting of 40 pages, is a complete, true and correct record of the testimony of Sam Hudson held in this case on January 14, 2014.

I also certify that prior to taking this deposition, Sam Hudson was duly sworn to tell the truth.

January 17, 2014

_____
Signature

MARY B. HOWLAND, CSR0078, CM
141 East Michigan, Suite 206
Kalamazoo, Michigan 49007
1-800-878-8750
My commission expires:
5/12/2019

(At 11:06 a.m. deposition concluded.)

* * * *

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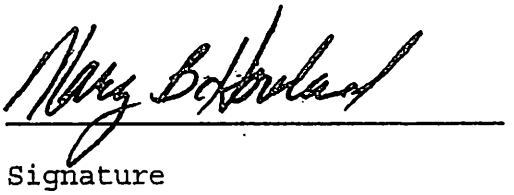

Signature

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5/12/2019

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

JONES FAMILY TRUST,
SYLVIA JONES, AND
BOBBY JONES,

Plaintiffs,

v. File No. 13-019698-NZ

ROHDE BROS. EXCAVATING, INC.,

Defendants.

/

OPINION AND ORDER OF THE COURT

At a session of said Court, held at the Court House in the City of Saginaw, County of Saginaw, and State of Michigan, this 31st day of August 2015;

PRESENT: HONORABLE ROBERT L. KACZMAREK, Circuit Judge.

This matter comes before the Court on Defendant Rohde Bros. Excavating Inc.'s Motions in Limine.

OPINION

I. Background

This matter involves allegations of damage to the Plaintiffs Jones' home at 339 S. 5th Ave., in the City of Saginaw ("the House"), as a result of the demolition of a neighboring house owned by the Saginaw County Land Bank Authority ("Land Bank") by Defendant Rohde Bros. Excavating, Inc. ("Rohde Bros."). Trial on Plaintiffs' claims of negligence, trespass, and breach of contract is scheduled to commence on September 1, 2015.

II. Discussion

A. Nature and/or Cost of Repairs, Replacement and/or Restoration of the House, and/or Value of Personal Property Therein

Rohde Bros. first moves the Court to exclude and argument, interrogation, evidence, or testimony relating to the nature and/or cost of repairs, replacement and/or restoration for Plaintiffs' home located at 339 S. 5th Avenue in the City of Saginaw, and/or the value of damaged personal property therein. Defendant argues such evidence is irrelevant, and thus inadmissible under MRE 402 and/or should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under MRE 403.

1. Evidence of Cost of Repairs, Replacement and/or Restoration of the House

Defendant Rohde Bros. argues that evidence of the cost of repairs, replacement, and/or restoration of the House is irrelevant the correct measure of damages to be applied in this case because it does not establish the fair market value of the property or how the damage was caused.[1] Defendant's argument appears to assume that the only correct measure of damages in this case is diminution if fair market value and, thus, only evidence as to the fair market value of the property is relevant. Accordingly, resolution on the instant motion requires the Court to first identify the law which governs the measure of damages applicable to the claims asserted.

a.) *Measure of Damages to the House*

[1] It is not apparent from Defendant's motion what meaning they assign to the term "cost of restoration of the House" The "cost of repairs" to Plaintiff's provides a clear measure of the "cost to restore" Plaintiff's house and the Court will treat the terms as synonymous for purposes of this Opinion.

Plaintiffs in this matter have brought both tort actions for negligence and trespass as well as a contract action for breach of a promise to a third-party beneficiary.[2] Having reviewed the matter, the Court concludes that Michigan law has identified the measure of damages to property using a market-based measure approach regardless of whether the damage claims are brought under a tort or contract theory. In this case, the measure of damages which makes a plaintiff whole for injury to real property is identical under all three causes pled.

(i.) Negligent Damage to Real Property

In its recent decision of *Price v. High Pointe Oil Co., Inc.*, 493 Mich. 238, 828 N.W.2d 660 (2013), our Supreme Court affirmed that the common law "*O'Donnell* rule" remains the measure of damages to property applicable to negligence claims in Michigan.[3] Specific rules have been established for the calculation of the damages recoverable in particular kinds of actions, and "[t]he O'Donnell rule is precisely such a specific rule in an action for the negligent destruction of property." *Id.* at 255, n.12. Under this rule:

> "If injury to property caused by negligence is permanent or irreparable, [the] measure of damages is [the] difference in its market value before and after said injury, but if [the] injury is reparable, and [the] expense of making repairs is less than [the] value of [the] property, [the] measure of damages is [the] cost of making repairs." [*Tillson v. Consumers' Power Co.*, 269 Mich. 53, 65, 256 N.W. 801 (1934), quoting *O'Donnell*, 262 Mich. at 471, 247 N.W. 720 (syllabus).]
>
> *Id.* at 244.

[2] As discussed in more detail, *infra*, both Plaintiffs' negligence and breach of contract claims involve the same conduct: Rohde Bros.'s alleged failure to use ordinary care while actively undertaking the work it was contracted to perform.

[3] The phrase "*O'Donnell* rule" refers to rule expressed in *O'Donnell v. Oliver Iron Mining Co.*, 262 Mich. 470, 247 N.W. 720 (1933), a real property case.

See also *Baranowski v. Strating*, 72 Mich.App. 548, 562, 250 N.W.2d 744 (1976), lv. den., 399 Mich. 881 (1977)("[I]t is generally recognized that damages for injury to real property are measured by one of two standards—diminution in value or reasonable cost of restoration or repair. Dobbs, Remedies, § 5.1, pp. 312-318. The rule followed in Michigan employs a combination of these two measures and is best stated in *Bayley Products, Inc. v. American Plastic Products Co.*, 30 Mich.App. 590, 186 N.W.2d 813 (1971): the measure of damages to real property in a negligence suit where the damage cannot be repaired is the difference between the market value of the property before and after the injury; where the damage can be repaired and the cost of repair is less than the value of the property prior to the injury, cost of repair is the proper measure.")(footnote omitted).

Although, the cost of repairs might make the structure more valuable than it was before the incident, our Supreme Court long ago affirmed the *O'Donnell* rule as the correct measure of tort damages for injury to real property damages notwithstanding defense argument "that plaintiff's building, when repaired, will be more valuable than before the accident" and urged that some deduction to the cost of repairs be made "for depreciation in value of the building prior to the accident, which depreciation resulted from age, use, and the fact that secondhand materials were used in its construction." *Tillson v. Consumers' Power Co.*, 269 Mich. 53, 65 (1934). Therefore, regardless of the whether the structure injured may have been both aged and of dubious quality, consideration of the cost of repairs provides the appropriate measure of damages, provided the injury is reparable and the expense of making repairs is less than the value of the property. On the other hand, when the cost of repairs exceeds the value of the

property, the law is clear that damages are measured by the diminution in fair market value.

(ii.) Trespass Damage to Real Property

The *O'Donnell* rule for measuring damages to real property has also been applied to tort claims brought under a theory of trespass. As observed by our Court of Appeals in the context of a trespass action where the defendant dumped some 44,000 cubic yards of rock onto the plaintiff's land, "it is the settled law of this state that the measure of damages to real property is the cost of repair only if the injury is reparable and the expense of repair is less than the market value of the property; otherwise, the measure of damages is the difference in the value of the property before and after the injury."[4] *Markstrom v. U.S. Steel Corp.*, 182 Mich.App. 570, 576 (1989)(emphasis added), *judgment rev'd by* 437 Mich. 936 (1991)(to allow option of restoring the property if defendant so preferred).

(iii.) Breach of Contract Damage to the House

Finally, with respect to the breach of contract claim, the Court observes the gravamen of the claim sounds in tort notwithstanding its label. As intended third-party beneficiaries, Plaintiffs have no expectancy under the contract other than that they receive the benefit the contracting parties intended for such third-parties receive. In this case, that benefit simply involves a promise by Rohde Bros. to "take care" in the performance of their contractual undertaking for the benefit and protection of certain classes of reasonably identifiable third-persons and property while undertaking its

[4] Additional compensation may be made awarded in a trespass action for the property destroyed by the trespass itself, such as trees destroyed, if that destroyed property has unique value of its own. *Schankin v. Buskirk*, 354 Mich. 490, 496 (1958).

performance of the contract for demolition services. The contract provides, in pertinent part:

> The contractor shall take care to protect abutting properties, pedestrians, motorists, and existing improvements which are not to be removed (ie. City Side Walks).
>
> *Defendants, City of Saginaw, Rohde Bros. Excavating, Inc's Brief in Support of Motion for Summary Disposition.*, Ex. 3, 4 (underlined emphasis added).

This language identifies no additional duty that is not already imposed by operation of the common law. In other words, even absent this specific contractual promise to exercise care to protect abutting properties and other third parties while performing the contract, Rohde Bros. was *already* under a duty to do precisely that under common law tort principles.

Michigan law recognizes that a contracting party is subject to a "preexisting common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings. That duty, which is imposed by law, is separate and distinct from defendant's contractual obligations..." *Loweke v. Ann Arbor Ceiling & Partition Co., L.L.C.*, 489 Mich. 157, 172 (2011). See also *Courtright v. Design Irr., Inc.*, 210 Mich.App. 528, 530, 534 N.W.2d 181, 181 - 183 (1995)("While performing a contract, a party owes a separate, general duty to perform with due care so as not to injure another. Breach of this duty may give rise to tort liability. *Clark v. Dalman*, 379 Mich. 251, 261, 150 N.W.2d 755 (1967). The duty to act with due care encompasses the duty to prevent injury from a peril created during performance.").

Consequently, with respect to the breach of contract claim, there is no contractual expectancy possessed by the third-party Plaintiffs under the relevant provision beyond the expectation that the common law duty of ordinary care would be followed – it is

nothing more than a promise not to act negligently. As Michigan law instructs that the *O'Donnell* rule is to be applied as the measure the damages for the negligent injury to real property resulting from a party's failure to exercise ordinary care, it again provides the measure of damages even when the cause is pled in the form of a breach of contract action.

Therefore, in light of the foregoing, the Court determines the appropriate measure of damages to the House in this case, regardless of the theory pled to support recovery of those damages, is the cost of repair only if the injury is reparable and the expense of repair is less than the market value of the property; otherwise, the measure of damages is the difference in the value of the property before and after the injury.

b.) *Evidence of Cost of Repairs to the House*

Defendant argues evidence of the cost of repairs to the House is irrelevant. However, given the manner in which damages are measured under the *O'Donnell* rule, cost of repairs to the House is a critical issue in this case to be determined by the trier-of-fact if they decide to award damages. If the jury finds there was damage to the House for which Rohde Bros. is liable, the jury must then determine whether the cost of repairing that damage is greater than the fair market value of the property prior to the injury. If the jury finds the cost of repairs exceed the value of the property, the economic unfeasibility of such repairs render it functionally "irreparable" and they must proceed to assign a value to the damages based on the difference in market value before and after said injury. Rohde Bros.'s request to exclude evidence of the cost of repairs from trial, as irrelevant or unduly prejudicial, is denied.

c.) *Evidence of Cost of Replacement of the House*

Defendant also moves the Court to exclude evidence of the replacement cost of the House, in the form of an estimate from Bailey Construction for building a new home. Rohde Bros. argues the evidence of the replacement cost (new), without any deduction for depreciation, is insufficient evidence of fair market value at the time of loss. Indeed, the Bailey Construction estimate is evidence of the cost to build a brand new two story 2361 square foot house at 339 S. 5th. Absent depreciation, it is not a "replacement" for the aging structure at issue, but the price to replace a theoretical brand new house that did not existed at the site at the time of the loss. As explained by our Court of Appeals:

> Clearly, replacement cost alone, without any deduction for depreciation, is not sufficient evidence of market value at the time of the loss. See State Highway Comm'r v. Predmore, 341 Mich. 639, 642, 68 N.W.2d 130 (1955); Bluemlein v. Szepanski, 101 Mich.App. 184, 192, 300 N.W.2d 493 (1980), lv. den. 411 Mich. 995 (1981). If replacement cost without depreciation was allowed, the plaintiff would recover an amount as if the property were new at the time it was destroyed. Bluemlein, supra .
>
> *Strzelecki v. Blaser's Lakeside Industries of Rice Lake, Inc.*, 133 Mich.App. 191, 194-195, 348 N.W.2d 311, 313 (1984).

Under the measure of damages to be applied in this case, the relevant determination to be made is fair market value regardless of the method of valuation used to arrive at the fair market value. Standing alone, the replacement cost (new) is inadmissible under both MRE 402 and MRE 403 as it has no tendency to show what the fair market value of the property was at the time of the injury and, even assuming some minimal relevancy could be articulated, its probative value would be substantially outweighed by the danger of unfair prejudice and misleading and/or confusing the jury on the issue of valuation of property.

As Plaintiffs do not indicate that they intend to make deductions for depreciation in order to arrive at the fair market value at the time of loss the evidence must be

excluded at trial. The Court also disagrees with the assertion that depreciation is simply a defense to the amount of damages, or that fair market value is not part of the applicable measure of damages, the Court concludes they are mistaken. The applicable measure of damages identified by the Court does require consideration of the market value of the property and depreciation is not a defense but the only way to proceed to determining a figure that is relevant to determining the market value of the property at the time of loss.

2. Evidence of the Value of Personal Property

Rohde Bros. also contends evidence and/or testimony with respect to the estimated cost for alleged damages to personal property within the House is irrelevant at trial. Defendant maintains the record is devoid of evidence and/or expert testimony alleging what specific pieces of personal property were damaged, and the value of the same, in order to provide an adequate foundation to remove such evidence from the realm of speculation and conjecture. Insofar as Defendant asserts Plaintiffs' lack evidence of specific items of damaged personalty or causation, such argument sounds in the nature of motion for summary disposition and not a motion in limine. In any event, Plaintiffs' respond with evidence that they identified the specific items of personalty allegedly and their estimated value. Moreover, expert testimony is not required to establish the value of such personalty. "Generally, the owner of personal property is qualified to testify regarding the value of such property where the testimony does not relate to sentimental, personal or subjective value to the owner. Testimony of the objective worth of an item is not excluded simply because the item legally has worth only to its owner." *People v. Brown*, 179 Mich.App. 131, 133-134, 445 N.W.2d 801 (1989); see also *Duma v. Janni*, 26 Mich.App. 445, 452, 182 N.W.2d 596, 600 (1970)("[A] person is deemed qualified to

testify regarding the value of his own personal property by dint of ownership."). Therefore, the Court denies Defendant's request to evidence and/or testimony as to the value of personal property allegedly lost.

B. Improvements Made at 339 S. 5th Ave. During Plaintiff's Ownership

Rohde Bros. next moves to exclude any argument, interrogation, evidence or testimony with respect to improvements made at 339 S. 5th Ave. during Plaintiffs' ownership as irrelevant to the fair market value. Plaintiffs respond that Defendants' argument is unclear, and the Court agrees. Improvements to real property obviously impact its market value. To the extent Rohde Bros.'s motion may be read to be limited to excluding evidence and testimony as to the *exact amount of money* spent on those improvements, and that there is no direct correlation between amounts expended and an increase in fair market value, the Court would agree with the general proposition that the amount of money expended on perceived improvements does not necessarily translate to a dollar-for-dollar increase in the market value of the property. The question is the value of the property, as improved, if placed on the market. In any event, Plaintiffs' response indicates they do not intend to offer testimony about the improvements made to the property.[5]

C. Loss of Rental Income

Rohde Bros. further moves for exclusion of any evidence or testimony relating to loss of income or profits with respect to Plaintiffs' rental property and/or inquiries about renting that property. Defendant contends this evidence is irrelevant as it is undisputed

[5] The Court would note, to the extent Plaintiffs' response further indicates they will be seeking to apply the personal injury "eggshell skull" instruction as to the House, no authority has been cited for the proposition that this principle of personal injury law applies to property damage claims.

that the rental property did not sustain damages as a result of its demolition activity and there is insufficient evidence to establish that Plaintiffs' moved into their rental property as a result of its demolition. A challenge to the sufficiency of the evidence to prove causation sounds in the nature of a motion for summary disposition, not limine. Plaintiffs respond they will introduce evidence to show that was the reason they moved into the rental property that previously was and could be rented, and that Rohde Bros. is liable for the foreseeable consequence that the occupants will have to live elsewhere when they inflict substantial damage on a family's primary home. The Court ascertains no basis to exclude such evidence as irrelevant or otherwise unduly prejudicial and Defendant's motion and Defendant's request is denied.

D. Knowledge of the State of the Foundation and Roof of the Adjacent Property

Rohde Bros. also moves for exclusion of any argument, interrogation, evidence, or testimony with respect to the City of Saginaw, Saginaw County Land Bank, and/or Rohde Bros. having knowledge of the state of the foundation and roof of the adjacent property. Defendant argues that the record is devoid that any of these parties had such knowledge. They then present a statement of the law of causation that the proofs must facilitate a reasonable inferences of causation, not speculation and assert any argument or interrogation about this topic would only confuse the jury. Plaintiffs respond that they are unsure what Defendant's counsel is seeking, but agree that whether the City or Land Bank had knowledge of the adjacent property's roof is irrelevant. The Court fails to ascertain from the motion why Rohde Bros. believes its knowledge of the condition of the house they were demolishing would be irrelevant to a claim of negligence. Therefore, the Court will grant the motion only to the extent the Court will exclude irrelevant

argument, interrogation, evidence, or testimony with respect to the City of Saginaw and Saginaw County Land Banks's knowledge of the foundation and roof of the adjacent property that was demolished.

E. Exemplary Damages

Rohde Bros. also seeks exclusion of any argument, evidence or testimony relating to exemplary damages. "Exemplary damages are compensatory in nature, not punitive, since they are actually an element of actual damages." *Rinaldi v. Rinaldi*, 122 Mich.App. 391, 397, 333 N.W.2d 61 (1983). Such damages compensate a plaintiff for the humiliation, sense of outrage, and indignity resulting from injuries so inflicted. *B & B Inv. Group v. Gitler*, 229 Mich.App. 1, 9-10, 581 N.W.2d 17 (1998). However, "an award of exemplary damages is justifiable only where it is first shown that defendant's conduct was malicious, or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights." *Bailey v. Graves*, 411 Mich. 510, 515, 309 N.W.2d 166 (1981). Our Supreme Court:

> has held that "willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." [FN47] Similarly, our standard civil jury instructions define "willful misconduct" as "conduct or a failure to act that was intended to harm the plaintiff" [FN48] and "wanton misconduct" as "conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result." [FN49]
>
> FN47. *Burnett v. City of Adrian,* 414 Mich. 448, 455, 326 N.W.2d 810 (1982).
>
> FN48. M. Civ. JI 14.12.
>
> FN49. M. Civ. JI 14.11.

Odom v. Wayne County, 482 Mich. 459, 475, 760 N.W.2d 217 (2008).

"The fact that a tort is committed intentionally does not mean that it was committed with malice or reckless disregard of the rights of others, or wantonly, as necessary to permit exemplary damages." *Bailey*, 411 Mich. at 515.

Defendant argues that Plaintiffs' complaint fails to set forth any allegations of gross negligence or the that the alleged damage was maliciously or wantonly inflicted, but only negligence and fails to set forth any facts or evidence that the alleged damage was malicious or wantonly inflicted. Plaintiff concedes that exemplary damages are not applicable to their negligence, but contend that such an award may be obtained as part of their breach of contract and/or trespass claims. As discussed above, the breach of contract claim sounds in tort as the alleged breach is the negligence of Rohde Bros. in not exercising care to protect Plaintiffs' property. Insofar as Plaintiffs assert that they can recover in breach of contract for the trespass of the portion of roof striking their house, the Court has already dismissed that trespass claim as intentional conduct is lacking. Plaintiffs assertion that exemplary damages may be had for the alleged trespassory cleanup activity depends on their characterization of the motive behind the cleanup as a coverup as opposed to conscientious effort to cleanup the mess they had created. The fact a cleanup occurred does not show the employees were conducting it maliciously or so willfully and wantonly as to demonstrate a reckless disregard for whether Plaintiffs would be harmed by having unwanted debris removed from their yard and their house washed. In any event, Michigan law instructs that noneconomic actual damages are not available for injury to real property. *Price*, *supra.* Nominal damages are instead awarded in trespass to vindicate the violation of property rights occasioned by the trespass.

Therefore, the Court will exclude seeks exclusion of any argument, evidence or testimony relating to exemplary damages.

F. Trespass Damages

Rohde Bros. moves to exclude any argument and/or evidence to support a theory of trespass damages allegedly caused by heavy equipment or Hardhat Doe. Defendant argues Plaintiffs have not provided evidence or testimony that any damage in complaint was caused by entrance of heavy equipment or Rohde Bros.'s alleged employee onto the subject matter of the property. Plaintiffs respond that they have suffered actual damages in the form of exemplary damages to Sylvia Jones, and that Rohde Bros.'s argument suggesting a complete lack of damages fails as a matter of law where at least nominal damages are available. As discussed above, exemplary damages are not available where the only evidence is that Rohde Bros.'s cleaned up their mess and noneconomic damages are not available for injury to real property. Plaintiffs are correct that they are entitled to at least nominal damages for the abstract injury to their property rights. If Plaintiffs do not have any evidence of actual damages caused by the trespass of heavy equipment of Hardhat Doe, then there is nothing to exclude. Therefore, the Court will deny Defendant's request.

G. Increased Utility Costs

Rohde Bros. further moves the Court to exclude any evidence, documentation, reports, bills and/or invoices with respect to increased utility costs at the House after its strike. Defendant maintains that aside from the actual bills, there is no evidence and/or testimony establishing the validity of the amounts, or whether said amounts were based on actual reading of utility consumption, the bills lack authentication and constitute

hearsay, and that there is insufficient evidence to support the increase was caused by its demolition activity. Defendant's challenge to the sufficiency of the evidence to prove causation sounds in the nature of an untimely motion for summary disposition, not limine. The Court determines that Defendant's further arguments as to whether the bills themselves cannot be authenticated and cannot be used for a non-hearsay purpose are premature and more properly raised at trial. However, Plaintiffs' response does indicate they do not to seek present evidence of increased utility cost damages in this matter because of the amount of resources that would be necessary to develop suitable evidence to prove the same. Therefore, the Court will grant Defendant's request to the extent the Court determines that the evidence of increased utility costs or bills cannot be considered by the trier-of-fact for the purpose of determining the amount of damages sustained by Plaintiffs.

H. Expert Testimony

Finally, Rohde Bros. requests that the Court exclude any evidence or testimony from Plaintiff's experts Walter Martlew and Sam Hudson, "with respect to the causation for the damage alleged in Plaintiffs' Amended Complaint as a result of the demolition to neighboring party." The Court has previously ruled on the issue of expert testimony from Martlew and Hudson in its ruling on Defendant's motion to strike them as witnesses. As a licensed builder, Hudson is being offered to provide expert testimony to establish what would be needed to repair or replace the home. Given his professional engineering and inspection background, Martlew is qualified to offer causal testimony, based on his personal inspection and witness descriptions, as to the damage allegedly sustained by the home as a result of the strike.

Insofar as the motion in limine questions the reliability of Martlew's opinions, Rohde Bros. must first identify the allegedly unsound opinion that Martlew intends to give before the Court can conduct any review of the basis for that opinion. Defendant argues that Martlew did not conduct any force analysis and had no preexisting information of the property's condition other than statements from Sylvia Jones. Defendant's motion specifically discusses Martlew's reliance on Sylvia Jones statements regarding a rise in heating costs after the impact. Rohde Bros. questions such reliance on Jones's word where Martlew himself did not conduct any independent analysis of the property's utility usage or comparison of average utility usage for other area properties that month. However, the lack of *additional* corroborating data goes to the weight the jury should accord Martlew's testimony. Notably, Defendant cites no authority that an expert cannot accept a witness's statement as true in formulating an opinion. The witness testimony supplies the facts upon which an expert bases an opinion in accordance with MRE 703. Any argument as to the credibility of the witness testimony underlying the expert opinion is for the jury to resolve and not this Court.

To the extent the motion also argues that Martlew has never confirmed that any alleged damage to the ductwork in the crawlspace of the House was caused by the impact, and is unable to distinguish between damage caused by the impact or a later frost heave, if Martlew has no opinion on the subject then there is no evidence to exclude. Moreover, Plaintiffs contend that the frost heave following the alleged damage to the House's heating system is but part of the causal chain and that Rohde Bros. remains liable for all the damage it proximately caused. Resolution of the causation issue is for the jury to determine. Consequently, the Court **DENIES** Defendant's request.

ORDER

Accordingly, the Court, **GRANTS**, in part, Defendant Rohde Bros. Excavating Inc.'s Motions in Limine insofar as the Court **ORDERS** Plaintiffs shall be excluded from making argument, conducting interrogation, or presenting evidence or testimony regarding: (1) the replacement cost (new) of the House without depreciation adjustment; (2) the exact amount of dollars spent on improvements; (3) the City of Saginaw and Saginaw County Land Banks's knowledge of the foundation and roof of the adjacent property that was demolished; and (4) exemplary damages, but **DENIES** the motion in all other respects.

It is so ordered.

ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Dated: August 31, 2015.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

JONES FAMILY TRUST, SYLVIA JONES & BOBBY JONES,

Plaintiffs,

v

ROHDE BROS. EXCAVATING, INC.,

Defendants.

Case No.: 13-019698-NZ-2

HON. ROBERT L. KACZMAREK

PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON THE PLEADINGS ON _____
BY:
__U.S. MAIL FAX__
__HAND DELIVERED OVERNIGHT COURIER__
__FEDERAL EXPRESS OTHER__

SIGNATURE _____

PHILIP L. ELLISON (P74117)
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A TRUE COPY
Susan Kaltenbach, Clerk

FILED
SAGINAW COUNTY, MICH.
2015 SEP 22 P 4: 50
SUSAN KALTENBACH
COUNTY CLERK

GREGORY W. MAIR (P 67465)
ROBERT A. JORDAN (P73801)
Atty for Defendant ROHDE BROS. EXCAVACTING
300 St Andrews Rd, Ste 302
Saginaw, Michigan 48638
989/790-0960

ORDER OF JUDGMENT

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE LOCATED IN THE CITY OF SAGINAW, COUNTY OF SAGINAW, STATE OF MICHIGAN ON THIS THE 22nd OF SEPTEMBER, 2015, A.D.

PRESENT: HON. ROBERT L. KACZMAREK, Circuit Judge

This is a final order of judgment wherein:

Upon the record, the parties agreed and stipulated to dismissal with prejudice of Plaintiffs, Sylvia and Bobby Jones, as individuals, from this matter. Parties further agree and stipulate to dismissal with prejudice of all claims against Defendant, Rohde Bros. Excavating, Inc., except for Plaintiff, Jones Family Trust's claim for breach of third party contract.

The Plaintiffs' claims of negligence and trespass against the Defendant, Rohde Bros. Excavating, Inc., is hereby dismissed by stipulation, with prejudice, but without costs or attorney fees to the parties.

Based upon the OPINION AND ORDER OF THE COURT, dated August 31, 2015, the parties agreed to entry of a final judgment against Defendant, Rohde Bros. Excavating, Inc., in the stipulated amount of $20,000.00 for the breach of third party contract claim in favor of Plaintiff, Jones Family Trust. Upon the record, it was further agreed and understood that Plaintiff, Jones Family Trust, will be appealing to the Michigan Court of Appeals to challenge the damages limitation decreed by the OPINION AND ORDER OF THE COURT, dated August 31, 2015. The Court finds that this issue is specifically preserved for appellate purposes.

As such, a judgment is hereby entered against Defendant, Rohde Bros. Excavating, Inc., in favor of Plaintiff, Jones Family Trust, in the amount of $20,000.00 for the breach of third party contract claim.

Upon the record, it was further agreed and understood that Plaintiff, Jones Family Trust, waived any and all rights to recover lost profits, attorney fees, and post-judgment interest beyond September 1, 2015.

Upon the record, it was further agreed and understood that Plaintiff, Jones Family Trust, has waived any and all costs incurred as of September 1, 2015 but shall be entitled, to the extent permitted by law (if any), to recover only court costs incurred after September 1, 2015 should the appeal be successful.

Upon the record, it was further agreed and understood that this final judgment is a final order conferring a right to appeal only on the breach of third party contract claim.

This is a final order and closes the case.

ROBERT L. KACZMAREK
Circuit Judge

Approved as to form:

Philip L Ellison
09/02/2015

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Attorney for Plaintiffs

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O'Neill, Wallace & Doyle, PC
Attorney for Defendant Rohde Bros

STATE OF MICHIGAN

COURT OF APPEALS

JONES FAMILY TRUST,

Plaintiff-Appellant/Cross-Appellee,

and

SYLVIA JONES and BOBBY JONES,

Plaintiffs,

v

SAGINAW COUNTY LAND BANK AUTHORITY,

Defendant-Appellee,

and

CITY OF SAGINAW and HARDHAT DOE,

Defendants,

and

ROHDE BROTHERS EXCAVATING, INC,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
April 20, 2017

No. 329442
Saginaw Circuit Court
LC No. 13-019698-NZ

Before: O'BRIEN, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiff-Appellant/Cross-Appellee, the Jones Family Trust ("the Trust"), appeals as of right and Defendant-Appellee/Cross-Appellant, Rohde Brothers Excavating, Inc. ("Rohde Brothers"), cross-appeals as of right the trial court's September 22, 2015 order judgment. On appeal, the Trust challenges the trial court's September 29, 2014 opinion and order, which granted summary disposition in favor of Defendant-Appellee, the Saginaw County Land Bank Authority ("the SCLBA"), on the Trust's strict-liability and inverse-condemnation claims, and the trial court's August 31, 2015 opinion and order, which permitted the case to proceed with respect to negligence damages only and concluded that depreciation constituted an element of

damages that must be proved by plaintiff. On cross-appeal, Rohde Brothers challenges the trial court's September 29, 2014 opinion and order, which denied summary disposition in its favor on the Trust's breach-of-contract claim, and the trial court's August 31, 2015 opinion and order, which permitted the Trust to seek lost profits with respect to a purportedly unrelated property. We affirm.

This lawsuit arises out of damage to a house in Saginaw, Michigan, owned by the Trust, and occupied by plaintiffs, Bobby Jones and Sylvia Jones ("Mr. and Mrs. Jones"), during the demolition of a house on an abutting property. The SCLBA owned the demolished house, and the City of Saginaw ("the City") apparently contracted with Rohde Brothers for purposes of demolishing the property using what plaintiffs' complaint described as "funds provided by a federal grant to combat urban blight." The complaint alleged that, during the demolition, parts or all of the demolished home "f[e]ll or otherwise collapse[d] into and upon" the Trust's property, and that, as a result of the damage, Mr. and Mrs. Jones, as well as their minor children, "were forced to move to another house on 5th Avenue owned by [the] Trust." Consequently, Mr. Jones, Mrs. Jones, and the Trust filed this lawsuit against the SCLBA, the City, Rohde Brothers, and an anonymous Rohde Brothers' employee, but the City and anonymous employee were eventually dismissed from this case by stipulation. In the complaint, plaintiffs alleged seven counts: (1) strict liability against the SCLBA, (2) inverse condemnation pursuant to federal law against the SCLBA and the City, (3) inverse condemnation pursuant to state law against the SCLBA and the City, (4) trespass against Rohde Brothers, (5) breach of a third-party contract apparently against Rohde Brothers, (6) negligence against Rohde Brothers, and (7) trespass against Rohde Brothers and one of its employees. Shortly after the lawsuit was filed, the parties began exchanging motions for summary disposition with respect to each of the seven counts.

The trial court addressed the parties' motions for summary disposition in three separate orders. With respect to plaintiffs' motion for summary disposition on its strict-liability claim and the SCLBA's motion for summary disposition on plaintiffs' strict-liability and inverse-condemnation claims, the trial court granted the SCBLA's motion with respect to each claim. First, it concluded that summary disposition with respect to the strict-liability claim was appropriate because the claim was barred by governmental immunity. Second, it concluded that summary disposition with respect to the inverse-condemnation claims was appropriate because the SCLBA's actions did not constitute a taking. With respect to Rohde Brothers' motion for summary disposition on plaintiffs' trespass, contract, and negligence claims, the trial court denied Rohde Brothers' motion with respect to each claim except for the trespass claim. First, it concluded that governmental immunity did not extend to Rohde Brothers. Second, it concluded that Rohde Brothers was entitled to summary disposition with respect to plaintiffs' trespass claim as it related "to the demolition strike itself" but not with respect to plaintiffs' trespass claim as it related to "other acts of trespass, including alleged unauthorized presence of heavy equipment and worker entry." Third, it concluded that questions remained with respect to plaintiffs' negligence and contract claims. Rohde Brothers attempted to challenge this decision on appeal, but, eventually, its application for leave to appeal was denied. *Jones Family Trust v Saginaw County Land Bank Auth*, unpublished order of the Court of Appeals, entered on October 24, 2014 (Docket No. 324106); *Jones Family Trust v Saginaw County Land Bank Auth*, unpublished order of the Court of Appeals, entered on May 12, 2015 (Docket No. 324792).

After these orders were entered, the Trust and Rohde Brothers scheduled a trial date, and the proceedings continued accordingly. Rohdes Brothers filed a motion in limine shortly thereafter, seeking to exclude (1) "[a]ny argument, interrogation, evidence or testimony relating to the nature and/or cost of repairs, replacement and/or restoration for Plaintiffs' property at 339 S. 5th Avenue, Saginaw, Michigan and/or value of damage personal property therein," (2) "[a]ny argument, interrogation, evidence or testimony with respect to improvements made at 339 S. 5th Avenue, Saginaw, Michigan, during Plaintiffs' ownership," (3) "[a]ny argument, evidence or testimony relating to loss of income or profits with respect to Plaintiffs' rental property and/or inquiries about renting same," (4) "[a]ny argument, interrogation, evidence or testimony with respect to the City of Saginaw, Saginaw County Land Bank and/or Defendant Rohde Bros. having knowledge of the state of foundation and roof of the adjacent property prior to demolition," (5) "[a]ny argument, evidence or testimony relating to exemplary damages," (6) "[a]ny argument and/or theory for trespass claim with respect to damage allegedly caused by heavy equipment and/or hard hat doe being on Plaintiffs' property," (7) "[a]ny evidence, documentation, reports, bills and/or invoices with respect to increased utility costs at 339. S. 5th Avenue, Saginaw, Michigan after the subject demolition," and (8) "[a]ny evidence or testimony from Walter Martlew and/or Sam Hudson with respect to causation for the damage alleged in Plaintiffs' Amended Complaint as a result of demolition to neighboring property."

The trial court granted Rohde Brothers' motion in part. The trial court agreed with Rohde Brothers' arguments that "the appropriate measure of damages to the House in this case, regardless of the theory pled to support recovery of those damages, is the cost of repair only if the injury is reparable and the expense of repair is less than the market value of the property; otherwise, the measure of damages is the difference in the value of the property before and after the injury," "that the amount of money expended on perceived improvements does not necessarily translate to a dollar-for-dollar increase in the market value of the property," that the exclusion of "irrelevant argument, interrogation, evidence, or testimony with respect to the City of Saginaw and Saginaw County Land Banks's knowledge of the foundation and roof of the adjacent property that was demolished" was appropriate, that the "exclusion of any argument, evidence or testimony relating to exemplary damages" was appropriate, and "that the evidence of increased utility costs or bills cannot be considered by the trier-of-fact for the purpose of determining the amount of damages sustained by Plaintiffs." The trial court disagreed, however, with Rohde Brothers' arguments that evidence regarding damages to personal property was irrelevant, that evidence regarding the loss of rental income for an unrelated property was irrelevant, that any argument with respect to trespass damage was irrelevant, and that Martlew and Hudson could not be qualified as expert witnesses. Proceedings then continued toward trial.

Before trial commenced, however, the Trust and Rohde Brothers settled. The order of judgment, which was signed by both parties' counsel and the trial court, expressly "stipulated to dismissal with prejudice of Plaintiffs, Sylvia and Bobby Jones, as individuals, from this matter" and "to dismissal with prejudice of all claims against Defendant, Rohde Bros. Excavating, Inc., except for Plaintiff, Jones Family Trust's claim for breach of third party contract." The order provided that "the parties agreed to entry of a final judgment against Defendant, Rohde Bros. Excavating, Inc., in the stipulated amount of $20,000.00 for the breach of third party contract claim in favor of Plaintiff, Jones Family Trust." "As such," the order provided, "a judgment is hereby entered against Defendant, Rohde Bros. Excavating, Inc., in favor of Plaintiff, Jones

Family Trust, in the amount of $20,000.00 for the breach of third party contract claim." This appeal and cross-appeal followed.

On appeal, the Trust first argues that the trial court erred in granting summary disposition in the SCLBA's favor on its inverse-condemnation claims. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material facts, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Id*. at 120.]

Constitutional issues are reviewed de novo as well. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 541; 688 NW2d 550 (2004).

> A taking for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property. When such a taking occurs, the Michigan Constitution entitles the property owner to compensation for the value of the property taken. A plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages. For a taking occur, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of property. In other words, the plaintiff must prove that the government's actions were a substantial cause of the decline of the value of the plaintiff's property and must establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. In determining whether a taking occurred, the form, intensity, and deliberateness of the governmental actions toward the injured party's property must be examined. [*Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 294-295; 769 NW2d 234 (2009) (citations and internal quotation marks omitted).]

Thus, an inverse-condemnation claim requires the proof of two elements: (1) "that the government's actions were a substantial cause of the decline" of the property's value and (2) that "the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id*. at 295.

As the trial court correctly recognized, nothing in the record supports a conclusion that the SCBLA performed "affirmative actions directly aimed at the plaintiff's property." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 295. The Trust relies on *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994), and *Estate Dev Co v Oakland*

County Rd Comm'n, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 273383), to supports its position, but the differences between the facts of this case and those in *Peterman* and *Estate Dev Co* support this conclusion. In *Peterman*, 446 Mich at 180-181, the Department of Natural Resources constructed a boat-launch ramp and jetties approximately 30 feet away from the plaintiff's beachfront property. Eventually, the jetties caused "plaintiffs' beach [to] virtually disappear[.]" *Id*. at 181. While the Department of Natural Resources did not perform any affirmative actions directly to the plaintiffs' property, "it undoubtedly set into motion the destructive forces that caused the erosion and eventual destruction of the property," this Court explained. *Id*. at 191. Similarly, in *Estate Dev Co*, unpub op at 4, the Oakland County Road Commission performed "construction activities [that] set into motion the forces that caused the flooding of plaintiff's property." This Court, recognizing that *Peterman* controlled, concluded that there was sufficient evidence "that defendant engaged in affirmative acts in the exercise of its road construction activities that, while not directly invading plaintiff's land, set into motion the destructive forces that caused the flooding to plaintiff's property." *Id*. In both of those cases, the government actor's deliberate act, i.e., installing jetties or performing construction, led to the unintended consequence of property damage after the deliberate act was completed. In this case, however, even if we assume that the SCLBA set the actions at issue into motion as the Trust contends, we nevertheless conclude that the government actor's deliberate act, i.e., demolishing the home, did not lead to any unintended consequences after the deliberate act was completed. Rather, an allegedly negligent act committed by the government actor, *during* the demolition, led to the damage. It is this distinction that prevents the application of *Peterman* and *Estate Dev Co* in the case at bar. Had, for example, the demolition of the home caused erosion to the Trust's property in the months after the demolition, *Peterman* and *Estate Dev Co* would arguably be controlling. Under the facts and circumstances of this case, however, they are not. Therefore, the trial court correctly determined that summary disposition was appropriate in this regard.

On appeal, the Trust also argues that the trial court erred by limiting damages according to our Supreme Court's decision in *Price v High Pointe Oil Co, Inc*, 493 Mich 238; 828 NW2d 660 (2013). We disagree.

Questions of law are reviewed de novo. *US Fidelity & Guar Co v Citizens Ins Co*, 241 Mich App 83, 85; 613 NW2d 740 (2000). A trial court's decision on a motion in limine is reviewed for an abuse of discretion. *Bellevue Ventures, Inc v Morang-Kelly Inv, Inc*, 302 Mich App 59, 63; 836 NW2d 898 (2013). In *Price*, 493 Mich at 244, this Court explained the *O'Donnell* limitation as follows:

> The common-law rule with respect to the damages recoverable in an action alleging the negligent destruction of property was set forth in *O'Donnell v Oliver Iron Mining Co*, 262 Mich 470; 247 NW 720 (1933). *O'Donnell* provides:
>
> > "If injury to property caused by negligence is permanent or irreparable, [the] measure of damages is [the] difference in its market value before and after said injury, but if [the] injury is reparable, and [the] expense of making repairs is less than [the] value of the [the] property, [the] measure of damages is [the] cost of making repairs." [*Tillson v Consumers Power Co*, 269 Mich 53,

> 65; 256 NW 801 (1934), quoting *O'Donnell*, 262 Mich at 471 (syllabus).]

The Trust claims that this standard, a tort standard, does not apply; rather, it claims that the Trust is entitled to be placed in as good as a position as it would have been had the contract not been breached, a contract standard. The Trust may be theoretically correct in this regard, see *Kokkonen v Wausau Homes, Inc*, 94 Mich App 603, 612; 289 NW2d 382 (1980), but, in our view, that conclusion is largely irrelevant. "It is well settled that the appropriate measure of damages for breach of contract . . . is that which would place the injured party in as good a position as it would have been in had the promised performance been rendered." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989); see also *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 426 n 3; 751 NW2d 8 (2008). What makes this analysis difficult is the fact that the Trust has consistently sought damages that appear to be in excess of this standard—the Trust contends that it is entitled to be put in a better position than it was before the alleged damage occurred. We cannot find any authority to support such a position. Ultimately, the contract at issue seemingly imposed a duty analogous to the common-law duty to act with care, and there is nothing in the record before this Court to support the Trust's position that the parties, by contracting that Rohde Brothers would "take care," intended to impose a higher contractual duty than that afforded by common law. *Lawrrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 7; 516 NW2d 43 (1994) (providing that the contracting parties' intent controls what damages are recoverable). Accordingly, while the Trust's argument might be theoretically correct, we are nevertheless unable to find any error with respect to the trial court's decision.

The Trust also argues on appeal that the trial court erred in determining that depreciation constituted an element of damages to be proved by a plaintiff instead of an affirmative defense to be proved by a defendant. Specifically, the Trust argues "that the value of the damages is replacement costs because replacement would require meeting all modern building codes (and losing all existing non-conforming uses)." We disagree.

Stated simply, we are unable to find any authority to support the Trust's ultimate position. As the Trust acknowledges on appeal, the trial court relied on this Court's opinion in *Strzelecki v Blaser's Lakeside Industries of Rice Lake, Inc*, 133 Mich App 191, 194-195; 348 NW2d 311 (1984), where we stated as follows with respect to depreciation:

> Clearly replacement cost alone, without any deduction for depreciation, is not sufficient evidence of market value at the time of the loss. See *State Highway Comm'r v Predmore*, 341 Mich 639, 642; 68 NW2d 130 (1955); *Bluemlein v Szepanski*, 101 Mich App 184, 192; 300 NW2d 493 (1980), lv den 411 Mich 995 (1981). If replacement cost without depreciation was allowed, the plaintiff would recover an amount as if the property were new at the time it was destroyed. *Bluemlein, supra*.

The same would be true here. While the Trust correctly points out that the *Strzelecki* decision is not binding, MCR 7.215(J)(1), its reasons for disagreeing are not persuasive.

On appeal, the Trust mentions three cases in support of its position: *Rasheed v Chrysler Corp*, 445 Mich 109; 517 NW2d 19 (1994), *McManamon v Redford Charter Twp*, 273 Mich App

131; 730 NW2d 757 (2006), *Dep't of Transp v VanElslander*, 460 Mich 127; 594 NW2d 841 (1999). However, none of these cases actually support the Trust's position. *Rasheed*, 445 Mich at 132, involved the mitigation of damages, but depreciation of property *prior to* the damage at issue has nothing to do with the mitigation of damage. *McManamon*, 273 Mich App at 141, stands for the proposition that damages are generally an issue of fact, but that does not address whether a plaintiff can ignore the condition of its property prior to the damage at issue. *Dep't of Transp*, 460 Mich at 129, explains that damages are intended to put the plaintiff in as good of a position as it would have been had the damage not occurred, which supports Rohde Brothers', not the Trust's, position here. In short, the Trust seeks to be put in a position that is better than its position before the alleged damage, and Michigan law has clearly and consistently rejected that position. See, e.g., *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 47 (2006) (citation and internal quotation marks omitted) ("The proper measure of damages for a breach of contract is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached."). Therefore, we conclude that depreciation constitutes part of what a plaintiff must demonstrate in proving his or her damages with reasonable certainty, not something that a defendant must prove as an affirmative defense. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

On cross-appeal, Rohde Brothers challenges the trial court's decisions on its motion for summary disposition and its motion in limine. However, "this Court has jurisdiction only over appeals filed by an aggrieved party." *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990) (citation and internal quotation marks omitted), overruled in part on other grounds by *Cam Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 557; 640 NW2d 256 (2002); see also MCR 7.203(A)(1)(a). Here, because Rohde Brothers stipulated to the order of judgment without expressly reserving its right to challenge certain decisions made by the trial court on appeal, Rohde Brothers is not an aggrieved party. See *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958) ("It is elementary that one cannot appeal from a consent judgment, order[,] or decree[.]"). We therefore believe that Rohde Brothers' arguments on cross-appeal could be rejected for that reason alone.

In any event, Rohde Brothers' first argument on cross-appeal challenges the trial court's denial of its motion for summary disposition on the Trust's breach-of-contract claim. Specifically, Rohde Brothers claims that summary disposition with respect to this claim was appropriate because the Trust was not an intended third-party beneficiary. We disagree.

Again, "[t]his Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 118.

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material facts, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Id*. at 120.]

"[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo. In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

MCL 600.1405 controls when determining whether a party is a third-party beneficiary to a contract, and it provides that only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor. *Brunsell v Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002). To be a third-party beneficiary to a contract, the contract must establish that the promisor has undertaken a promise directly to or for that third party. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). Ultimately, the dispositive question is "whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status[.]" *Id*. (citations and internal quotation marks omitted). "Similarly, consistent with our specific rule (subsection 1405[2][b]), this Court has adopted the persuasive rule that a third-party beneficiary may be one of a class of persons, *if the class is sufficiently described or designated*." *Koenig v South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999) (citation and internal quotation marks omitted; emphasis in original).

In this case, it is undisputed that the contract between the City and Rohde Brothers provided, in pertinent part, as follows: "The contractor shall take care to protect abutting properties . . . ." "Abutting properties," or more precisely the owners of abutting properties, represent a sufficiently described class of beneficiaries so as to confer third-party status upon those owners. *Brunsell*, 467 Mich at 296-298; *Koenig*, 460 Mich at 679-680. Therefore, because the City and Rohde Brothers expressly contracted to "take care to protect abutting properties," we conclude that a question of fact remained as to whether the Trust, as an owner of an abutting property, was an intended third-party beneficiary. MCL 600.1405.

Rohde Brothers also argues that summary disposition was appropriate because the Trust could not prove causation or damages. However, causation-in-fact and damages are both elements that generally present questions of fact to be decided by a trier of fact, not an appellate court. *Winkler v Carey*, 474 Mich 1118; 712 NW2d 451 (2006), relying on "the reasons stated in" *Winkler v Carey*, unpublished opinion of the Court of Appeals, issued December 1, 2005 (Docket No. 255193), p 3 (O'CONNELL, J., dissenting); *McManamon*, 273 Mich App at 141. The determination as to whether Rohde Brothers failed to "take care to protect abutting properties" and whether its failure, assuming one, to do so resulted in damages are simply not issues that can be decided as a matter of law on appeal. Therefore, because causation-in-fact and damages present questions that should have been presented to a factfinder if disputed, this Court declines to, for the first time, address these factual disputes.

Rohde Brothers also argues on cross-appeal that the trial court erred in denying its motion in limine to preclude evidence with respect to any lost profits sustained by the Trust as a result of Mr. and Mrs. Jones' decision to move into the Trust's rental property while the damaged home was being repaired. We disagree.

A trial court's decision on a motion in limine is reviewed for an abuse of discretion. *Bellevue Ventures, Inc*, 302 Mich App at 63. "Under the rule of *Hadley v Baxendale*, 9 Exch

341; 156 Eng Rep 145 (1854), the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980). Thus, "a party who fails to perform its contractual obligations becomes liable for all foreseeable damages flowing from the breach." *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 427-428; 528 NW2d 749 (1995). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc*, 256 Mich App at 512.

In this case, Rohde Brothers claims that the Trust's lost profits from a rental property that Mr. and Mrs. Jones decided to reside in while the damaged home was being repaired are too far removed to be recoverable. While, on its face, this argument appears logical, it overlooks the fact that the lost profits were a result of Mr. and Mrs. Jones choosing to reside in this rental property as opposed to, for example, renting a different home. In our view, nothing in the record supports the notion that the costs of residing elsewhere, whether those costs are in the form of rent for or lost profits from a rental property, were not foreseeable here. While it is plausible, for example, that Rohde Brothers could have persuaded a factfinder that the lost profits claimed or that Mr. and Mrs. Jones' decision to move from the damaged property were unreasonable, those factual determinations would have been appropriate for the factfinder, not this Court, to make. Therefore, we conclude that the trial court properly denied Rohde Brothers' motion in limine in this regard.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

STATE OF MICHIGAN

COURT OF APPEALS

ESTATE DEVELOPMENT COMPANY,

Plaintiff-Appellant,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant/Third-Party Plaintiff-Appellee,

and

THOMPSON-MCCULLY COMPANY, a/k/a THOMPSON-MCCULLY COMPANY, L.L.C.,

Third-Party Defendant/Third-Party Plaintiff-Appellee,

and

OAKLAND EXCAVATING COMPANY, OWEN TREE SERVICE, and ACKLEY CONSTRUCTION,

Third-Party Defendants.

UNPUBLISHED
November 20, 2007

No. 273383
Oakland Circuit Court
LC No. 2004-057182-CC

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

In this inverse condemnation action alleging an unconstitutional taking of property, plaintiff appeals by leave granted from an order granting summary disposition in favor of defendant Oakland County Road Commission, pursuant to MCR 2.116(C)(10). We reverse and remand.

This Court reviews de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). In reviewing a motion under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to

the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

This Court recently summarized the law regarding unconstitutional takings in *Heydon v Mediaone of Southeast Michigan, Inc*, 275 Mich App 267, 279-280; ___ NW2d ___ (2007):

> The federal and state constitutions both proscribe the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000); *Oakland Co Bd of Co Rd Comm'rs v JBD Rochester, LLC*, 271 Mich App 113, 114; 718 NW2d 845 (2006). The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 543; 481 NW2d 762 (1992).
>
> " 'Taking' is a term of art with respect to the constitutional right to just compensation and does not necessarily mean the actual and total conversion of the property. Whether a 'taking' occurs for which compensation is due depends on the facts and circumstances of each case." *Hart v Detroit*, 416 Mich 488, 500; 331 NW2d 438 (1982). A governmental entity's actions might amount to a taking of private property even though the agency never directly exercised control over the property, provided that some action by the government constitutes a direct disturbance of or interference with property rights. *In re Acquisition of Land—Virginia Park*, 121 Mich App 153, 159; 328 NW2d 602 (1982).

"What governmental action constitutes a 'taking' is not narrowly construed, nor does it require an actual physical invasion of the property." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004); see also *Peterman v Dep't of Natural Resources*, 446 Mich 177, 189; 521 NW2d 499 (1994).

Initially, we conclude that the trial court erred in determining that plaintiff could not establish an unconstitutional taking claim because it did not have a vested right to develop the property in the manner it desired, given that it never obtained final approval for its development plans.

One who asserts a taking claim must first establish that a vested property right is affected. *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 787-788; 527 NW2d 468 (1994). To constitute a vested right, the interest must be something more than such a mere expectation. *Id*.

In this case, regardless whether plaintiff is able to develop the property in a particular manner, plaintiff is the undisputed owner of the affected property. Property owners have the right to complete possession and enjoyment of their land and to not have their property flooded with water. *Peterman*, *supra* at 189 and n 16. As the Court observed in *Peterman*:

> [A]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of value of property by an act of

> government, which directly and not merely incidentally affects it, is to that extent an appropriation. [*Id.* at 190, quoting *Vanderlip v Grand Rapids*, 73 Mich 522, 534; 41 NW 677 (1889) (citation and internal quotations omitted).]

Thus, plaintiff's claim that its property was flooded is sufficient to establish that its vested property rights were affected.

We also conclude that the trial court erred in determining that there was no genuine issue of material fact with regard to whether defendant's actions were a substantial cause of the flooding on plaintiff's property.

To constitute a taking, the government need not directly invade the plaintiff's land; causation may be established where it set into motion the destructive forces that caused the damage to the plaintiff's property. *Peterman, supra* at 191.

Plaintiff relied on circumstantial evidence to prove causation. In *Skinner v Square D Co*, 445 Mich 153, 164-165, 166-167; 516 NW2d 475 (1994), the Court explained what is sufficient circumstantial proof of causation:

> To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. In *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956), this Court highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:
>
> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence."
>
> We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.
>
> * * *
>
> [W]e concur with the observation made in 57A Am Jur 2d, Negligence, § 461, p 442:

> All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established.

In this case, viewed in a light most favorable to plaintiff, the evidence provided a reliable basis from which reasonable minds could infer that more probably than not, defendant's construction activities set into motion the forces that caused the flooding of plaintiff's property. Plaintiff presented evidence that a culvert acted as an outlet for Mirror Lake, controlling the lake level at 955.55 feet above sea level. Shortly after defendant began cutting trees and brush in the area of the culvert, debris and vegetation were found that blocked the drain leading to the culvert, and a wetlands assessment revealed that the water level had moved upland. Moreover, plaintiff presented evidence that defendant's replacement culvert was blocked during the road construction project due to improper installation of the pipe, and that Mirror Lake continued to rise during this period. Joseph Rokicsak, a wetlands surveyor who investigated Mirror Lake, opined that the lake had grown in size because of restricted outflow and observed that debris and vegetation blocked the drain leaving the lake. Although defendant presented evidence suggesting that a blockage occurred before the road construction project began, plaintiff's evidence was sufficient to create an issue of fact whether defendant's activities caused the flooding to plaintiff's property.

To establish a de facto taking claim, plaintiff is also required to show causation. This may be established by showing that defendant abused its legitimate powers through affirmative actions directly aimed at plaintiff's property. *Hinojosa, supra* at 548; *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004).

In *Peterman,* the Court held that the government's action in constructing a boat launch and installing jetties, which resulted in the diminishment of the plaintiffs' fast land, was sufficient to establish a taking. *Peterman, supra* at 200, 207-208. Although the government did not directly invade the plaintiffs' land, it set into motion the destructive forces that caused the erosion and eventual destruction of the plaintiffs' property. *Id*. at 191. The Court rejected the government's argument that it need not compensate the plaintiffs because its actions were within its legitimate power to improve navigation of the state's waterways. *Id.* The Court concluded that "simply because the state is acting to improve navigation does not grant it the power to condemn all property without compensation." *Id*. at 198.

We believe that *Peterman* controls the disposition of this case. As in *Peterman*, plaintiff presented evidence that defendant set in force destructive forces that caused flooding to plaintiff's land. Contrary to what defendant argues, this case does not involve a situation where damage resulted because of an alleged omission by the government. See *Hinojosa*, *supra*. Rather, the basis for plaintiff's taking claim is that defendant engaged in affirmative acts in the exercise of its road construction activities that, while not directly invading plaintiff's land, set into motion the destructive forces that caused the flooding to plaintiff's property.

For these reasons, the trial court erred in granting defendant's motion for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray

STATE OF MICHIGAN

COURT OF APPEALS

ESTATE DEVELOPMENT COMPANY,

Plaintiff-Appellant-Cross-Appellee,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Third-Party-Plaintiff-Appellee-Cross-Appellant,

v

THOMPSON-MCCULLY COMPANY, a/k/a THOMPSON-MCCULLY COMPANY, LLC,

Third-Party-Defendant-Third-Party-Plaintiff-Appellee,

v

OAKLAND EXCAVATING COMPANY, OWEN TREE SERVICE, and ACKLEY CONSTRUCTION,

Third-Party-Defendants.

UNPUBLISHED
March 24, 2011

Nos. 291989
Oakland Circuit Court
LC No. 2004-057182-CC

ESTATE DEVELOPMENT COMPANY,

Plaintiff-Appellee,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Third-Party-Plaintiff-Appellee,

v

No. 292159
Oakland Circuit Court
LC No. 2004-057182-CC

THOMPSON-MCCULLY COMPANY, a/k/a THOMPSON-MCCULLY COMPANY, LLC,

Third-Party-Defendant-Third-Party-Plaintiff-Appellant,

v

OAKLAND EXCAVATING COMPANY, OWEN TREE SERVICE, and ACKLEY CONSTRUCTION,

Third-Party-Defendants-Appellees.

ESTATE DEVELOPMENT COMPANY,

Plaintiff,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Third-Party-Plaintiff,

v

THOMPSON-MCCULLY COMPANY, a/k/a THOMPSON-MCCULLY COMPANY, LLC,

Third-Party-Defendant-Third-Party-Plaintiff-Appellant,

v

OAKLAND EXCAVATING COMPANY,

Third-Party-Defendant-Appellee,

and

OWEN TREE SERVICE and ACKLEY CONSTRUCTION,

Third-Party-Defendants.

No. 295968
Oakland Circuit Court
LC No. 2004-057182-CC

Before: MURPHY, C.J., and STEPHENS and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff's real property adjacent to Mirror Lake was allegedly flooded and the wetlands thereon expanded as a result of a clogged and otherwise problematic lake drainage culvert running under Pontiac Trail Drive, which culvert typically drained waters from Mirror Lake to another lake and kept Mirror Lake at a fairly constant level. Plaintiff's position was that a road widening and resurfacing project (road project) commenced by defendant Oakland County Road Commission (OCRC) with respect to Pontiac Trail Drive caused the culvert blockage and defects in the drainage system, leading to the flooding and wetland expansion relative to the property that plaintiff desired to use for a housing development. Plaintiff filed suit against OCRC on numerous theories, including a claim of inverse condemnation. OCRC thereafter filed a third-party complaint against Thompson-McCully Company (T-M), the general contractor on the road project. And T-M in turn filed a third-party complaint against the subcontractors associated with the road project – Oakland Excavating Company (Oakland), Owen Tree Service (Owen), and Ackley Construction (Ackley). The trial court granted summary disposition in favor of OCRC on each of the counts in plaintiff's complaint and found all of the third-party complaints moot because of the summary disposition ruling. This Court eventually granted plaintiff's application for leave to appeal, reversed the order granting OCRC's motion for summary disposition on the inverse condemnation claim, and remanded the case for further proceedings. *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 273383). Subsequently, the jury returned a verdict in favor of plaintiff on plaintiff's inverse condemnation claim in the amount of $1,747,000.[1] A directed verdict was entered against T-M on OCRC's third-party complaint, requiring T-M to indemnify OCRC. And the jury returned a verdict of no cause of action on T-M's third-party complaint against subcontractors Oakland and Owen.[2] In Docket No. 291989, plaintiff appeals the trial court's order denying its request for case evaluation sanctions, and OCRC cross appeals the judgment on plaintiff's inverse condemnation claim, arguing that the claim was not ripe for litigation, that there were instructional errors, that the elements of a taking were not established, that it could not be held liable for the negligence of the contractor and subcontractors, that there was prejudicial attorney misconduct, and that it was entitled to remittitur, as the damages were speculative. In Docket No. 292159, T-M contends that the trial court erred in directing a verdict against it and in favor of OCRC on the question of indemnification and that the jury no-cause verdict in favor of the subcontractors was against the great weight of the evidence. T-M also maintains that, with respect to the judgment against OCRC and in favor of plaintiff on the inverse condemnation claim, reversal is required because of instructional error, and it argues that OCRC was entitled to a judgment notwithstanding the verdict (JNOV). Finally, in Docket No. 295968, T-M appeals the trial court's order granting case evaluation sanctions in favor of

[1] The judgment subsequently entered upon the verdict was in the amount of $2,229,910, which amount reflected the jury's verdict plus statutory prejudgment interest under MCL 600.6013.

[2] Subcontractor Ackley was dismissed as a party prior to trial pursuant to a stipulated order.

Oakland and against T-M. We affirm in all respects, except that we reverse and remand in regard to the trial court's order denying plaintiff's request for case evaluation sanctions against OCRC.

I. LAW OF THE CASE DOCTRINE

The law of the case doctrine is implicated in this appeal, so we begin by setting forth the governing principles applicable when examining the doctrine. We review de novo the legal question of whether and to what extent the law of the case doctrine applies in a given situation. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008). In *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), the Michigan Supreme Court, explaining the principles regarding the law of the case doctrine, stated:

> Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals.
>
> Law of the case applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal. [Citations, footnote, and internal quotations omitted.]

The rationale behind the law of the case doctrine is to maintain consistency and to avoid reconsideration of issues and matters previously decided during the course of a particular lawsuit. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). A conclusion by this Court that a prior appellate decision in the same case constituted error is not sufficient, in and of itself, to justify ignoring the doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992). "Normally, the law of the case applies regardless of the correctness of the prior decision, but the doctrine is not inflexible." *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). The law of the case doctrine does not preclude reconsideration of a question if there has been an intervening change of law. *Id.* For this exception to apply, the change of law must occur after this Court's initial decision. *Id*.

II. ANALYSIS

A. DOCKET NO. 291989

1. OCRC'S CROSS-APPEAL ON TRIAL AND DAMAGE ISSUES

Because the issue of whether plaintiff is entitled to case evaluation sanctions rests on the assumption that the verdict in favor of plaintiff is legally sound, we shall first address OCRC's cross-appeal, which challenges the soundness of the verdict. T-M presents arguments in Docket No. 292159 that also cast aspersion on the verdict; however, T-M's arguments mimic those

presented by OCRC. Thus, plaintiff's complaint that T-M lacks standing to raise appellate arguments on behalf of OCRC is essentially moot.

(a) RIPENESS

OCRC first argues that plaintiff's inverse condemnation claim was not ripe. OCRC asserts that plaintiff was obligated to obtain, but never did, a final decision from the City of Orchard Lake Village regarding wetland boundaries and development of the property in order to clarify the scope of any claimed limitations relative to the use of the property. OCRC contends that, absent a final decision, "there could be no proper evaluation of whether a constitutionally cognizable deprivation of property or taking occurred." Matters concerning justiciability, such as the doctrine of ripeness, are reviewed de novo on appeal. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006), overruled on other grounds in *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371; 792 NW2d 686 (2010).

On review of OCRC's brief submitted in the prior appeal, while OCRC did not use the "ripeness" nomenclature, the substance of the argument is virtually identical to the argument presented to us. In the first appeal, the panel stated that "the trial court erred in determining that plaintiff could not establish an unconstitutional taking claim because it did not have a vested right to develop the property in the manner it desired, given that it never obtained final approval for its development plans." *Estate Dev Co*, slip op at 2. This Court held that "plaintiff's claim that its property was flooded is sufficient to establish that its vested property rights were affected." *Id.*, slip op at 3. Therefore, this Court previously addressed and ruled on the legal question now raised and then remanded the case for further proceedings. Accordingly, the law of the case doctrine is properly applied to bar OCRC's ripeness argument.

"When this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits." *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), citing *Borkus v Michigan Nat'l Bank*, 117 Mich App 662, 666; 324 NW2d 123 (1982). On the basis of this caselaw, OCRC argues that it would be improper to apply the law of the case doctrine, considering that the prior decision merely resulted in a remand for trial predicated on the existence of a genuine issue of material fact. We find that OCRC reads these cases much too broadly. On the particular issue of whether plaintiff had a vested right to pursue a claim for inverse condemnation absent final approval from Orchard Lake relative to a specific wetlands line, the earlier panel decided the issue as a matter of law on the merits; it did not find that there was a genuine issue of material fact on the issue. Stated otherwise, this Court made the legal determination that final approval from Orchard Lake was unnecessary to pursue the action, as the flooding of the property would form a sufficient basis to proceed. *Brown* and *Borkus* do not preclude application of the law of the case doctrine relative to every issue determined by the appellate court, especially purely legal matters, simply because the appellate court ultimately reversed on the basis that genuine issues of material fact existed. If we interpreted *Brown* and *Borkus* as suggested by OCRC, our ruling would essentially eviscerate the law of the case doctrine.

Even absent application of the law of the case doctrine, the case was ripe to litigate. With respect to the doctrine of ripeness, it precludes the adjudication of hypothetical or contingent claims before an actual injury has been sustained, and an action is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all. *Michigan Chiropractic*, 475 Mich at 371 n 14. Ripeness focuses on the timing of an action, requiring an assessment of a pending claim to discern whether an actual or imminent injury is in fact present. *Id.* at 378-379. OCRC relies on zoning cases that stand for the proposition that a property owner must obtain a final decision from the relevant municipality regarding the application of a zoning ordinance or regulation to the property owner's land before it is possible to tell whether the land retained any reasonable beneficial use or whether existing expectation interests have been destroyed. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 158; 683 NW2d 755 (2004), citing *MacDonald, Sommer & Frates v Yolo Co*, 477 US 340, 349; 106 S Ct 2561; 91 L Ed 2d 285 (1986). We find that the zoning cases have no application for determining ripeness in the context of this case where plaintiff's suit was premised on an alleged physical invasion of the property (water) set in motion by the road project and not merely the application of a zoning ordinance or regulation to property. It is inherently logical to require a final determination from a municipality that has enacted a zoning ordinance or regulation before an affected property owner can sue the municipality for a property deprivation, given that the property owner may still be able to reasonably use or develop the land through alternative zoning mechanisms that the municipality ultimately could allow the property owner to employ. See *Oceco Land Co v Dep't of Natural Resources*, 216 Mich App 310, 314; 548 NW2d 702 (1996) ("A taking claim ripens when the landowner has received a final decision *regarding the application of a regulation* to his property") (emphasis added). But when there is an alleged physical invasion of property resulting from the government's action, a lawsuit is ripe for judicial review. See *Lingle v Chevron USA, Inc*, 544 US 528, 537; 125 S Ct 2074; 161 L Ed 2d 876 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property); *Peterman v Dep't of Natural Resources*, 446 Mich 177, 189 n 16; 521 NW2d 499 (1994) (when real property is actually invaded by induced water, earth, sand, or other material, a taking occurs within the meaning of the constitutions); *Ashley v Port Huron*, 35 Mich 296 (1877) ("A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other"); *Ligon v Detroit*, 276 Mich App 120, 132; 739 NW2d 900 (2007) (when a government taking results from an actual physical invasion of property, a taking occurs). We agree with plaintiff that OCRC's argument goes to the issue of determining the diminution of fair market value for purposes of assessing damages, not to whether the suit was ripe. The substance of OCRC's ripeness argument is renewed in connection with its argument that the damages awarded by the jury were excessive and speculative, which argument we reject later in this opinion.

(b) INSTRUCTIONS AND EVIDENCE ON ELEMENTS OF INVERSE CONDEMNATION

In three separately-framed arguments, OCRC contends that the trial court erred with respect to the instructions given to the jury on the liability aspect of the inverse condemnation claim, that plaintiff failed to provide evidence on the elements necessary to establish inverse condemnation, and that the OCRC could not be held liable for the acts of its contractors. Because these arguments dovetail into the single issue of what exactly must be proven to

establish a claim of inverse condemnation, we have consolidated the three arguments for purposes of our analysis.[3] The trial court instructed the jury, in relevant part, as follows:

> Plaintiff['s] claim[] in this matter is called an inverse condemnation claim. An inverse condemnation claim is instituted by a private property owner whose property[,] while not formally taken by eminent domain proceedings for a public use[,] has been damaged by a public improvement undertaking or other public activity.
>
> In order to establish its claim of inverse condemnation Plaintiff must prove that [OCRC] set into motion the destructive forces that caused damage to the Plaintiff's property.
>
> The government cannot avoid liability for inverse condemnation by authorizing work to be done by a third party whether the third party is an agent of the government or an independent contractor.

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[3] In regard to claims of instructional error, they are generally reviewed de novo on appeal and must be reviewed de novo when the claims concern questions of law or pure legal issues. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008); *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). Jury instructions must include all of the elements of a cause of action and should not omit material issues, defenses, or theories of the parties when supported by the evidence. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id.* Reversal on the basis of instructional error is only required if the failure to reverse would be inconsistent with substantial justice. *Id.*, citing MCR 2.613(A).

Regarding the claimed evidentiary failures, they were preserved below and encompassed within OCRC's motion for directed verdict. We review de novo a trial court's ruling on a motion for directed verdict or JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). With respect to such motions, the evidence and all legitimate inferences are examined in a light most favorable to the nonmoving party. *Id.* "A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.* If reasonable jurors could have honestly reached different conclusions, we cannot interfere with the jury's verdict, which must be allowed to stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

> I have just listed for you the proposition on which the Plaintiff has the burden of proof. For the Plaintiff to satisfy this burden, the evidence must persuade you that the proposition is true. You must consider all of the evidence regardless of which party produced it.
>
> If you decide that the Plaintiff has satisfied its burden of proof regarding its claim on inverse condemnation, you must decide the just compensation to be awarded to Plaintiff.

At this juncture, the trial court launched into instructions addressing just compensation, fair market value, and related damage principles.

OCRC maintains that the trial court erred by failing to instruct the jury that plaintiff was required to prove that OCRC abused its legitimate governmental powers in affirmative actions directly aimed at the property, which actions were a substantial cause of the decline of the property's value. In conjunction with this argument, OCRC argues that plaintiff failed to submit evidence establishing these elements that should have been recited in the jury instructions. According to OCRC, its actions were directed at improving Pontiac Trail Drive, which it had a statutory duty to maintain in reasonable repair, and that the culvert itself was not even designed to direct water *to* plaintiff's property. Moreover, the road project plans certainly did not include blocking the culvert. Indeed, the plans required the contractors to remove sediment collected in culverts. We note that if the instructional arguments fail, the evidentiary arguments paralleling the instructional arguments also fail, as they both relate to the elements of inverse condemnation.

In *Blue Harvest, Inc v Dep't of Transportation*, 288 Mich App 267, 277; 792 NW2d 798 (2010), this Court recently explored a claim of inverse condemnation:

> "An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings." *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989)(citation and quotation marks omitted). "While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006)(citation and quotation marks omitted). Generally, a plaintiff alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). "Further, a plaintiff alleging inverse condemnation must prove a casual connection between the government's action and the alleged damages." *Id.*

The property owner "must establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295; 769 NW2d 234 (2009). "Where . . . property has been damaged rather than completely taken by governmental actions, the owner

may be able to recover by way of inverse condemnation." *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004); see also *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 334 n 3; 572 NW2d 201 (1998) (an injury to an individual's property that deprives the owner of the ordinary use of the property is the equivalent of a taking, entitling the landowner to compensation); *Goldberg v Detroit*, 121 Mich App 153, 158; 328 NW2d 602 (1983).

The trial court failed to instruct the jury consistent with the above-cited caselaw, except with respect to the need to show an affirmative act, which was necessarily part of the instruction that plaintiff had to prove that OCRC *set into motion* destructive forces (hereafter "destructive-forces instruction").[4] However, reversal is not warranted in light of the law of the case doctrine and our Supreme Court's opinion in *Peterman*. With respect to the law of the case doctrine, in its appellee brief in the first appeal, OCRC argued that plaintiff could not satisfy the elements of an inverse condemnation claim, essentially raising the same issues presented here. This Court held:

> To establish a de facto taking claim, plaintiff is also required to show causation. This *may* be established by showing that defendant abused its legitimate powers through affirmative actions directly aimed at plaintiff's property.
>
> In *Peterman*, the Court held that the government's action in constructing a boat launch and installing jetties, which resulted in the diminishment of the plaintiffs' fast land, was sufficient to establish a taking. Although the government did not directly invade the plaintiffs' land, it set into motion the destructive forces that caused the erosion and eventual destruction of the plaintiffs' property. The Court rejected the government's argument that it need not compensate the plaintiffs because its actions were within its legitimate power to improve navigation of the state's waterways. The Court concluded that "simply because the state is acting to improve navigation does not grant it the power to condemn all property without compensation."
>
> We believe that *Peterman* controls the disposition of this case. As in *Peterman*, plaintiff presented evidence that [OCRC] set in [motion] destructive forces that caused flooding to plaintiff's land. Contrary to what [OCRC] argues, this case does not involve a situation where damage resulted because of an alleged omission by the government. Rather, the basis for plaintiff's taking claim is that [OCRC] engaged in affirmative acts in the exercise of its road construction activities that, while not directly invading plaintiff's land, set into motion the

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[4] To the extent that OCRC continues to assert that plaintiff's case involved omissions and not affirmative acts, we disagree, as did the prior panel. Even though there may have been a failure to dislodge debris from the culvert, said inaction fell under the umbrella of the larger affirmative act of engaging in and performing activities under the road project.

> destructive forces that caused the flooding to plaintiff's property. [*Estate Dev Co*, slip op at 4 (citations omitted; emphasis added).]

As reflected in this passage, the panel indicated that a claim of inverse condemnation may be established by showing that a governmental entity abused its legitimate powers through affirmative actions directly aimed at the plaintiff's property. But the panel phrased the proposition in such a manner that did not make it a mandatory part of the proofs. Instead, it merely indicated that a plaintiff "may" establish a claim of inverse condemnation through such proofs. Furthermore, the panel moved directly into a discussion of *Peterman*. This Court's prior opinion rejected OCRC's arguments that are posed anew in the present appeal, i.e., that plaintiff had to prove (with consistent jury instructions thereon) that OCRC abused its legitimate governmental powers in affirmative actions directly aimed at plaintiff's property. There was no significant change evidence-wise between the documentary evidence presented at summary disposition and that introduced at trial with respect to whether OCRC abused its legitimate governmental powers in affirmative actions directly aimed at plaintiff's property. Regardless of the legal soundness of the panel's earlier ruling, the ruling constitutes law of the case. *Freeman*, 212 Mich App at 38; *Bennett*, 197 Mich App at 500.

When the prior panel announced that *Peterman* was controlling and extensively applied *Peterman* in addressing the appellate issues, the principles from *Peterman* became the law of the case for purposes of remand and further proceedings, even if *Peterman* could be interpreted as being at odds with some of the other caselaw on inverse condemnation. It would be expected that the trial court follow *Peterman*. See *Lopatin*, 462 Mich at 260 ("[lower] tribunal may not take action on remand that is inconsistent with the judgment of the appellate court"). Requiring proof that OCRC set into motion destructive forces that eventually caused damage to plaintiff's property does not appear to entail a need to show a *substantial* causal link, a need to show *abuse* of legitimate governmental powers, or a need to show affirmative actions *directly aimed* at the property. We disagree with OCRC's assessment that the destructive-forces language only encapsulates the element of causation; rather, it also includes the need to show that the government committed a particular affirmative act that set forces into motion, even though the act need not be directly aimed at the property at issue, nor constitute an abuse of legitimate governmental powers. It would patently offend the law of the case doctrine for us to reverse the trial court on the premise that it should have followed caselaw other than *Peterman* when the prior panel ruled that *Peterman* controlled; the whole purpose of the doctrine is to maintain consistency within a suit.

Even absent application of the law of the case doctrine, *Peterman* is binding Supreme Court precedent. We shall briefly examine *Peterman*, wherein our Supreme Court ruled:

> At issue is the erosion of plaintiffs' beachfront property because of the construction of a boat launch and jetties that altered the littoral drift of the current thereby depriving plaintiffs' property of the sand that had previously nourished and replenished it. Defendant contends that because it never actually invaded plaintiffs' property, its destruction is not embraced within the Taking Clause. In other words, defendant contends that its actions did not unconstitutionally take plaintiffs' property because the erosion of the beachfront was an *indirect consequence* of defendant's actions. . . . [T]his Court is reluctant to relieve the

government of its duty to compensate a property owner unless the destruction of property is "too remote, trivial or uncertain" to deprive a claim of merit.

* * *

Taking has been found, therefore, when the state has eliminated access to property, or made the usual access to plaintiffs' land very difficult. Similarly, damage to property caused by a nearby nuisance maintained by the state is compensable, as are damages arising from the removal of "lateral support of adjacent grounds to the injury of their owners." In fact, inverse condemnation may occur even without a physical taking of property, where the effect of a governmental regulation is "to prevent the use of much of plaintiffs' property . . . for any profitable purpose."

In short,

"'[a]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation.'"

In the instant case, the trial court found that defendant's actions were the proximate cause of the destruction of plaintiffs' beachfront property. *Assuming that defendant did not directly invade plaintiffs' land, it undoubtedly set into motion the destructive forces that caused the erosion and eventual destruction of the property*. Defendant was forewarned that the construction of the jetties could very well result in the washing away of plaintiffs' property, and the evidence reveals that the destruction of plaintiffs' property was the natural and direct result of the defendant's construction of the boat launch. The effect of defendant's actions were no less destructive than bulldozing the property into the bay. . . . Defendant, therefore, may not hide behind the shield of causation in the instant case. [*Peterman*, 446 Mich at 188-191 (citations omitted; emphasis added).]

As indicated earlier in our opinion, the *Peterman* Court noted that when real property is actually invaded by induced water, earth, sand, or other material, a taking occurs within the meaning of the constitutions. *Id.* at 189 n 16. The *Peterman* Court clearly indicated that an inverse condemnation action could be sustained where damages were an indirect consequence of the government's actions and absent a direct invasion of property. The construction of the boat launch and jetties did not constitute an action directly aimed at the plaintiffs' property, nor did the Court rely on a finding that the DNR *abused* its legitimate governmental powers, yet the inverse condemnation claim was held to be legally sound. Ultimately, the key question in *Peterman* was whether the government set into motion destructive forces that caused damage to property and that framing of the issue is consistent with the instructions given by the trial court in the case at bar.

OCRC next complains of error in the court's instruction that characterized an inverse condemnation claim as one "instituted by a private property owner whose property while not formally taken by eminent domain proceedings for a public use has been damaged by a public improvement undertaking or other public activity." Contrary to OCRC's argument, this instruction is consistent with the caselaw. See *Spiek*, 456 Mich at 334 n 3; *Merkur Steel*, 261 Mich App at 129; *Goldberg*, 121 Mich App at 158.

Next, OCRC argues that the trial court should have instructed the jury that OCRC could defend itself by showing that the contractors had negligently performed the work that resulted in the blocked culvert. In that same vein, OCRC additionally maintains that the court should not have instructed the jury that OCRC was unable to avoid liability for inverse condemnation simply because it authorized the work to be done by third parties, whether an agent or an independent contractor. OCRC argues that the instructions effectively made it "strictly liable for any and all acts by independent contractors whether those acts are properly part of a governmental project or they are negligent acts neither called for nor contemplated in the plans for the project." OCRC contends that this case was, at most, a negligence case and not one of inverse condemnation. And OCRC is immune from liability for negligence claims relating to the performance of a governmental function, MCL 691.1407(1). OCRC argues that plaintiff is attempting to circumvent governmental immunity for tort claims by reclassifying its tort claim as an inverse condemnation claim. OCRC contends that because the various contractors actually performed the work that may have led to the clogging of the culvert, without OCRC's direction to block the culvert, OCRC was insulated from liability, entitling it to a directed verdict.

OCRC fails to cite any relevant caselaw supporting the general proposition that a governmental entity cannot be held liable *with respect to the law of inverse condemnation* where activities causing a taking are performed by agents and contractors.[5] In general, T-M and the subcontractors were performing work on behalf and under the authority of OCRC and they were acting within the scope of their authority. See *Sherlock v Mobile Co*, 241 Ala 247, 249; 2 So2d 405 (1941) (the county "cannot avoid liability to property owners for property taken or for injury done . . . by authorizing the work to be done by a third person acting by the county's authority, whether such third person be an agent or an independent contractor"). OCRC grounds its argument on the distinction that the specific acts that allegedly caused the flooding and wetlands expansion were not authorized by OCRC or envisioned as being part of the process in carrying out the engineering plans, but instead constituted negligence on the part of the contractors. And it is the negligence aspect that shields OCRC from a claim of inverse condemnation. OCRC implicitly appears to accept that if a project is completed by contractors pursuant to plans and specifications and absent any negligence, a governmental entity could be held liable for inverse

[5] Importantly, we are not yet looking at this issue in the context of a tort or negligent act being committed by a contractor that results in a taking. Rather, we are initially examining the issue in general terms of whether a governmental entity can escape an inverse condemnation claim because the activity at issue was performed by an agent or contractor.

condemnation if the project as designed caused a physical invasion of property, even though contractors performed the work.

In the context of tort law, a governmental agency is potentially liable only if the case against it falls into one of the enumerated statutory exceptions to governmental immunity. *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). Thus, merely because an employee or agent of a governmental entity was negligent, it does not mean that the entity itself is subject to liability, unless one of the exceptions applies. MCL 691.1407(1) states that, "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." There can be no reasonable dispute that OCRC was engaged in the exercise and discharge of a governmental function with respect to performing the road project. See MCL 224.21(2) ("A county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel").

In the first appeal, OCRC argued that they were insulated from liability because it did not perform the construction activities that allegedly resulted in the damages. The argument was implicitly yet clearly rejected by this Court, given that it examined evidence of trees, brush, vegetation, and debris blocking the culvert and considered that evidence in finding an issue of fact on causation. *And this evidence pertained to construction activities performed by the contractors*. While OCRC did not expressly frame its appellate arguments in the prior appeal in terms of contractor "negligence," its focus on the activities of the contractors as a basis to affirm the summary dismissal order necessarily encompassed all activities, negligent or otherwise. Accordingly, the law of the case doctrine precludes consideration of OCRC's contractor-tort arguments.

It is true that part of plaintiff's suit, regardless of the constitutional labels used by plaintiff, sounded in tort law, where plaintiff alleged negligent performance by the contractors in executing the road project. However, another aspect of this case that evolved with respect to erosion materials blocking the culvert was that there were some arguments and evidence that the removal of trees and bushes that would typically halt erosion, the change in the slope of the roadway embankment that made the slope steeper and the embankment more susceptible to erosion, the lack of any or adequate erosion controls, and the installation of an inadequately-sized culvert, all of which were encompassed within the road project's plans and designs, played a role in causing erosion sediment, soils, and materials to block the culvert. OCRC fails to address this component of plaintiff's case in relation to its contractor-tort argument. Indeed, the foreign caselaw cited by OCRC supports a claim of inverse condemnation based on a project's design that causes a physical invasion of property. See, e.g., *Bd of Comm'rs of the Little Rock Municipal Water Works v Sterling*, 268 Ark 998, 1001-1002; 597 SW2d 850 (Ark App, 1980). We note that the no-cause verdict in favor of the subcontractors suggests that the jurors did not find any active contractor negligence. We further note that OCRC does not appear to claim that its own negligence could not be relied upon by the jury in rendering its verdict, and there was evidence that OCRC was contacted about debris blocking the culvert and failed to timely clear the blockage.

Furthermore, regardless of whether plaintiff's case was premised in whole or in part on tort principles, *Peterman* can be read as permitting a negligence-based inverse condemnation claim, where its "setting into motion" language is very broad and not necessarily restricted to *intentional* governmental action, i.e., the government could negligently set into motion destructive forces. This conclusion is supported by the *Peterman* Court's statement that "because defendant's *unscientific construction* of the boat launch unnecessarily caused the destruction of plaintiffs' beach, compensation must be awarded for the loss of the beach." *Peterman*, 446 Mich at 208 (emphasis added).

In sum, we reject OCRC's contractor-tort arguments, and the trial court did not err in denying OCRC's motion for directed verdict, nor did it err in connection with the jury instructions.[6]

Finally, OCRC asserts that the evidence revealed that the wetlands expansion occurred well in advance of the road project; therefore, plaintiff failed to establish that the road project set into motion destructive forces that caused the expansion. We disagree. There was sufficient trial evidence and inferences arising from the evidence, when viewed in a light most favorable to plaintiff, to allow the causation issue to go to the jury, which is consistent with the ruling by the prior panel that relied on documentary evidence comparable to the evidence that was eventually presented at trial.

(c) ATTORNEY MISCONDUCT

OCRC claims that plaintiff's counsel committed misconduct when he made the following remarks during closing arguments on rebuttal:

> Abraham Lincoln, great American, also a lawyer, wanted to ask his political opponent during a debate do you still beat your wife. Do you still beat your wife. Natural inclination is to answer no, but even that answer leaves the suspicion that at one time you did beat your wife. And that's a lawyer for you, they know tricks and they spend their careers devising schemes to do the best possible thing they can for their client in a court of law.
>
> Mr. Potter [OCRC's attorney] even shared with you one of the tricks he uses. . . . Well, wasn't that your strategy, Mr. Potter. That's a lawyer trick.[7]

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[6] OCRC also presents an argument built around the common-work-area doctrine. We find, however, that the common-work-area doctrine has no relevancy to the case at bar, as we are not concerned with dangers at work sites that create a risk of injury to workers. *Latham v Barton Malow Co*, 480 Mich 105, 111-113; 746 NW2d 868 (2008).

This is the sole instance of alleged misconduct. Given the brevity of the comments and the fairly innocuous nature of the remarks, when examined in context and in light of the lengthy trial, the comments did not affect OCRC's substantial rights and they were harmless, assuming that they were improper in the first place. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982); *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 682-683; 630 NW2d 356 (2001). Moreover, OCRC failed to preserve the issue with an objection or motion for mistrial, and it cannot reasonably be concluded that the remarks resulted or played too large of a part in the jury's verdict, nor can it be found that the remarks denied OCRC a fair trial. *Reetz*, 416 Mich at 102-103.

(d) REMITTITUR

OCRC argues in cursory fashion that it is entitled to remittitur or a new trial because the damages were excessive and speculative. OCRC claims that the damages awarded to plaintiff, which were based on the decrease in the value of the property due to the property being undevelopable, were inherently speculative because the claim was not ripe. Further, the Takings Clause does not guarantee property owners an economic profit from use of their land, and plaintiff's past history of development around Mirror Lake demonstrated that claimed lost profits were purely speculative. According to OCRC, plaintiff only provided projections and the projections were contingent on unknown and uncertain factors.

We initially find that OCRC, within the framework of the argument itself, fails to provide any citation to the record regarding the testimony on damages, fails to discuss any of the particular testimony on damages or just compensation, and it simply makes broad, sweeping complaints about the damage award absent elaboration and without tying them to the record and testimony. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [Citation omitted.]

Additionally, the issue was not adequately preserved for appeal because OCRC never properly moved for a new trial premised on remititur. *Pena v Ingham Co Rd Comm*, 255 Mich

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[7] Here, the "trick" supposedly used by OCRC's attorney is that when he deposes an expert witness and obtains a favorable statement, counsel does not ask for an explanation concerning the statement, and then, when the expert testifies at trial, counsel elicits the favorable statement and when the expert attempts to explain the statement, counsel remarks that the expert never gave that explanation at the deposition. OCRC omits this part of the closing rebuttal argument made by plaintiff's counsel.

App 299, 315-316; 660 NW2d 351 (2003) ("Although defendant forcefully argues the excessiveness of the verdict, it never moved in the trial court for a remittitur or a new trial on this ground[,]" and "[c]onsequently, defendant has failed to preserve this argument for appellate review"). We are fully aware of the procedural aspects of this case which transpired after entry of the judgments, including OCRC's motion for remand filed with this Court. However, it was OCRC's failure to identify a remittitur issue in the remand motion that resulted in denial of the motion. *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished order of the Court of Appeals, entered June 25, 2009 (Docket Nos. 291989 and 292159).

Furthermore, OCRC's arguments do not warrant reversal on the issue of damages. With respect to the argument framed in terms of ripeness, the testimony by Janet Green, city clerk for Orchard Lake, and by Frank Bonzetti, one of plaintiff's owners, established that the development was indeed going to be permitted by Orchard Lake, but for the expansion of the wetland lines. And it was that very expansion that formed the basis of plaintiff's lawsuit. It is nonsensical for OCRC to complain that plaintiff did not obtain final approval of the development when it was OCRC's own conduct that deprived plaintiff of receiving that approval. Further, while plaintiff may not have obtained a formal rejection from the city to proceed with the development, Green's testimony clearly established that the project was dead because of the change in the wetland lines.[8] Our analysis also provides further support for the conclusion that plaintiff's suit was ripe.

In regard to the alleged excessive and speculative damage award, the testimony by Bronzetti, along with that of a real estate expert, provided evidence of the planned development, the costs associated with such a development, the revenues that likely would have been generated by the development in light of other developments, and the diminution in value of the property. The testimony supported the dollar amount reached by the jury. The damage award was not the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake, and the award was within the limits of what reasonable minds would deem just compensation for the damage sustained. *Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009). The damage award was supported by objective factors and was firmly grounded in the record; to rule otherwise would usurp the jury's authority to determine the amount of damages. *Id.* Moreover, the jury was permitted to consider the most profitable and advantageous use of the land, even if the use was still in the planning stages and had not yet been executed. *Merkur Steel*, 261 Mich App at 134-136. This principle was included in a jury instruction here, and OCRC does not challenge that instruction. The damages were not excessive, nor unduly speculative. Reversal is unwarranted.

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[8] OCRC argues that the wetland boundaries may have changed between 1984 and prior to commencement of the road project; therefore, reliance on the new survey in relationship to proving damages made the damage request and award speculative. However, this was an issue properly left for the jury to contemplate and not for us resolve as a matter of law.

(e) JNOV

In Docket No. 292159, T-M argues that OCRC was entitled to a JNOV on the inverse condemnation claim for reasons already addressed and rejected above.

2. PLAINTIFF'S APPEAL REGARDING DENIAL OF CASE EVALUATION SANCTIONS

Plaintiff appeals the trial court's denial of its motion seeking case evaluation sanctions against OCRC. This issue is complicated by the procedural history of the case relative to the dates associated with case evaluation, the timing of the order granting OCRC's motion for summary disposition, and the subsequent reversal of that ruling by this Court on appeal. This Court reviews de novo a trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O). *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). The legal principles governing the construction and application of statutes apply equally to the interpretation of court rules. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). Accordingly, we begin with examining the plain language of the court rule, and if it is unambiguous, "we must enforce the meaning expressed, without further judicial construction or interpretation." *Id.*

Plaintiff argues that case evaluation sanctions should have been awarded pursuant to MCR 2.403(O)(1), where OCRC rejected the $75,000 case evaluation recommendation, and where the verdict of $1,747,000 was more favorable to plaintiff than the case evaluation. MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

Plaintiff and OCRC both rejected the case evaluation by operation of MCR 2.403(L)(1) when they failed to file a written acceptance or rejection. A "verdict" includes the jury verdict entered against OCRC. MCR 2.403(O)(2)(a). A verdict is "considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation." MCR 2.403(O)(3). The verdict here was more than ten percent above the case evaluation. Under the plain language of the court rule, plaintiff was entitled to actual costs, which include a reasonable attorney fee for services necessitated by the rejection of case evaluation. MCR 2.403(O)(6)(b). The question that we must answer is whether entry of the order granting OCRC's motion for summary disposition during the 28-day, case-evaluation response period (hereafter "response period") excused OCRC from further participation in the case evaluation process and from having to make an acceptance-rejection decision before the response period expired, such that OCRC cannot be sanctioned after the inverse condemnation claim was reinstated and plaintiff obtained a more favorable verdict than the case evaluation.

We find that because plaintiff had a right to move for reconsideration, MCR 2.119(F), and to file an appeal, MCR 7.205, there always remained a possibility that plaintiff's case might

be reinstated, and thus OCRC remained a party who was obliged to participate in case evaluation until all postjudgment measures had been exhausted.

Under MCR 2.403(O)(1), the liability for costs can potentially arise only where "a party has rejected an evaluation and the *action proceeds to verdict*[.]" (Emphasis added.) Further, under MCR 2.403(O)(2)(c), a "verdict" includes "a judgment entered as a result of a ruling on a motion *after rejection of the case evaluation*." (Emphasis added.) These two provisions support the proposition that, for purposes of chronology, you must first have a rejection of case evaluation *followed by* the entry of an unfavorable verdict before the rejecting party on the losing end of the verdict becomes liable for sanctions. Therefore, in our case, when the trial court entered the order granting OCRC's motion for summary disposition *prior to OCRS's rejection* of case evaluation, and there is no dispute that a summary disposition order is a verdict, it would first appear that OCRC had safe haven from any sanctions, such that it should be excused from further participation in the case evaluation process before the response period lapsed. However, even though OCRC was temporarily protected from sanctions, a broader view of the litigation and the workings of reconsideration and appellate rules would have put OCRC on notice that the summary disposition order was subject to reversal on reconsideration or appeal, with a possibility of an unfavorable verdict looming on the horizon. Because of this procedural reality, the balance of the response period remained relevant and the case evaluation was not rendered moot, despite the order granting summary disposition in favor of OCRC. There is no language in MCR 2.403(O) supporting OCRC's position. Support for our conclusion is found in *Peterson v Fertel*, 283 Mich App 232; 770 NW2d 47 (2009).[9]

Here is an outline of the events as they transpired in *Peterson, id.* at 234:

1. April 16, 2007 – The case evaluation took place and the panel recommended an award in favor of the plaintiff and against two defendant doctors.

2. May 1, 2007 – The trial court granted summary disposition in favor of the doctors on motions filed after the case evaluation recommendation was revealed.

3. May 11, 2007 – The plaintiff filed a motion for reconsideration of the summary disposition order.

4. May 15, 2007 – The plaintiff rejected case evaluation by operation of MCR 2.403(L)(1) when she failed to accept or reject during the 28-day response period.

5. May 15, 2007 (or earlier) – One doctor accepted and one doctor rejected the case evaluation.

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[9] Plaintiff did not cite *Peterson* in the original motion for case evaluation sanctions on April 1, 2009. This is because the *Peterson* opinion was not issued until April 9, 2009. *Peterson* was cited in plaintiff's motion for reconsideration of the trial court's order denying case evaluation sanctions.

6. June 19, 2007 – The trial court denied the plaintiff's motion for reconsideration and later awarded case evaluation sanctions to the doctors.

The plaintiff appealed the award of sanctions, arguing that the trial court erred "because the trial court granted summary disposition . . . *before* plaintiff rejected the case evaluation." *Id.* at 236-237 (emphasis in original). The plaintiff maintained "that the trial court made its dispositive ruling before the rejection and that this rendered the case evaluation irrelevant because [the doctors] were already dismissed from the case." *Id.* at 237. This Court, in affirming the sanctions, held that the order denying the plaintiff's motion for reconsideration qualified as a "verdict" under MCR 2.403(O)(2)(c) and that this provision "does not limit its definition of 'verdict' to orders following motions for summary disposition." *Id.* According to the *Peterson* panel, the order denying reconsideration "indisputably constitutes a ruling on a motion *after* plaintiff rejected the case evaluation." *Id.* Stated otherwise, the *Peterson* panel ruled that simply because a summary disposition order had been entered, it did not mean that the balance of the case evaluation response period was rendered moot, as a subsequent order of the court could also fit the definition of a "verdict" and arise *after* a rejection. The jury verdict here, entered after the summary disposition order was entered and pursuant to plaintiff's right to seek reconsideration and an appeal, arose *after* OCRC rejected the case evaluation.

As indicated in *Peterson, id.* at 237-238:

> [U]nlike cases holding that certain orders do not constitute verdicts, this case does not involve an alternative resolution, like settlement or arbitration, that would indicate a mutual decision to avoid further litigation and trial. Plaintiff characterizes the case evaluation as "totally irrelevant" after the grant of summary disposition, but this ignores the plain objective of a motion for reconsideration in this context, which is to call attention to the trial court's alleged error in granting the motion for summary disposition, to urge the reversal of that decision, to keep the action alive against the defendants and, at its essence, to continue the litigation toward trial.

Here, plaintiff had 21 days from entry of the summary disposition order in which to file its motion for reconsideration, MCR 2.119(F)(1), "in order to keep the action alive," and during a portion of that time period the clock continued to tick with respect to accepting or rejecting the case evaluation. The fact that plaintiff filed its motion for reconsideration on the last day of the response period is irrelevant, as there remained additional time to file the motion under MCR 2.119(F)(1), which should have kept OCRC's guard up. Even after the denial of the motion for reconsideration, plaintiff filed the appeal, MCR 7.205, "in order to keep the action alive."[10]

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[10] This Court has determined that "it is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)." *Keiser v Allstate Ins Co*, 195 Mich. App. 369, 374-375; 491 N.W.2d 581 (1992); see also *McManamon v Redford Charter Twp*, 273 Mich App 131; 730 NW2d 757 (2006).

Plaintiff succeeded and eventually obtained a verdict more favorable to it than the case evaluation rejected by OCRC. Had plaintiff succeeded on the motion for reconsideration followed by the favorable jury verdict, absent this Court's involvement in the suit, it certainly would have been entitled to case evaluation sanctions. Accordingly, case evaluation was not rendered moot after entry of the summary disposition order, and OCRC's rejection of case evaluation subjected it to the possibility of sanctions should plaintiff ultimately succeed during the remaining course of the litigation. It must be noted that had this Court affirmed the order granting OCRC's motion for summary disposition, the order denying plaintiff's motion for reconsideration would have constituted a "verdict" entered *after* plaintiff's rejection of case evaluation under the *Peterson* analysis, thereby entitling OCRC to sanctions. The balance of the response period was not moot as to *any* party.[11]

T-M and OCRC argue that awarding case evaluation sanctions to plaintiff goes against the purpose of sanctions, which is to place the burden of litigation costs onto the party that rejected the case evaluation recommendation in order to move toward and force a trial, and OCRC did not reject in an effort to take the case to trial as the case had already been dismissed, but plaintiff was attempting to force a trial. This argument is inconsistent with *Peterson* and the language of MCR 2.403(O), which does not preclude a party from receiving case evaluation sanctions just because it rejected the case evaluation and proceeded to trial. Ultimately, under MCR 2.403(O), it does not matter why OCRC rejected the case evaluation. In fact, MCR 2.403(O)(1) allows case evaluation sanctions to be awarded to a party even where the party rejected the recommended award if the subsequent verdict is more favorable to that rejecting party than the case evaluation, unless the exception in MCR 2.403(O)(11) applies. MCR 2.403(O)(11), the "interest of justice" exception, does not apply here because it is only implicated when "the 'verdict' is the result of a motion," not a jury trial. OCRC's argument that sanctions should not be awarded because of the unusual sequence of events in this case lacks merit because the caselaw cited in support of the proposition dealt with the "interest of justice" exception, which is not implicated.

In sum, the trial court erred in denying plaintiff's request for case evaluation sanctions. We remand for further proceedings relative to the calculation of the proper amount of sanctions.

B. DOCKET NO. 292159

1. T-M'S APPEAL OF THE DIRECTED VERDICT ON INDEMNIFICATION

The issue of indemnification is controlled by MDOT's specifications, and in particular section 107.10A, which was incorporated into the OCRC/T-M contract and which provided:

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[11] T-M's reliance on *Salter v Patton*, 261 Mich App 559; 682 NW2d 537 (2004), for the proposition that following a dismissal a defendant is no longer a party to the case is wholly lacking in merit, as the defendants in *Salter* were dismissed because of a settlement agreement, which would not permit a party thereafter "to keep the action alive," and not an order granting summary disposition. Other cases cited by T-M are also irrelevant and distinguishable.

> The Contractor [T-M] shall save harmless, indemnify and defend in litigation the State, the Commission, the Department and its agents[12] and employees, against all claims for damages to public or private property and for injuries to persons arising out of and during the progress and to completion of work.

In *Badiee v Brighton Area Schools*, 265 Mich App 343, 351-352; 695 NW2d 521 (2005), this Court set forth the following governing principles with regard to contractual indemnification:

> This Court construes indemnity contracts in the same manner it construes contracts generally. "An unambiguous contract must be enforced according to its terms." If indemnity contracts are ambiguous, the trier of fact must determine the intent of the parties. "While it is true that indemnity contracts are construed strictly against the party who drafts them and against the indemnitee, it is also true that indemnity contracts should be construed to give effect to the intentions of the parties." [Citations omitted.]

T-M argues that the trial court erred in directing a verdict in favor of OCRC because the indemnification provision does not expressly or implicitly apply to inverse condemnation claims. According to T-M, the indemnification provision only covers tort-type damages, which are distinct from constitutional awards for governmental takings. This argument lacks merit. An inverse condemnation claim can be based on a physical invasion of property caused by the government, giving rise to a claim for damages in order to make the property owner whole. *Spiek*, 456 Mich at 334 n 3; *Merkur Steel*, 261 Mich App at 134-136; *Goldberg*, 121 Mich App at 158. The indemnification agreement covered "all" claims for damages to private property arising out of and during the progress of the road project. Contrary to T-M's arguments, the language in the indemnification agreement is plain and unambiguous, and it necessarily encompasses the inverse condemnation claim filed by plaintiff. Because the indemnification provision is not ambiguous, there was no need for the jury to address and resolve the parties' intent and sending the issue to the jury would have been error. And this analysis and conclusion is equally applicable to T-M's argument that the agreement's requirement to procure insurance for "property damage" did not entail insurance for inverse condemnation losses. The case involves property damage, pure and simple.

T-M contends that the indemnification provision is unenforceable and violates public policy pursuant to MCL 691.991, which provides:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith,

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[12] This includes OCRC, and there is no dispute on that matter.

> purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

First, the indemnification agreement did not pertain to the construction or repair of a "building, structure, appurtenance and appliance." Further, under the statute, "an indemnitor is not liable for the indemnitee's negligence, unless the indemnitor is also negligent, regardless of contractual language to the contrary." *Sentry Ins Co v Nat'l Steel Corp*, 147 Mich App 214, 219; 382 NW2d 753 (1985). Here, OCRC's liability was premised, in part, on the negligent or wrongful actions of T-M, the indemnitor. Therefore, MCL 691.991 does not bar application of the indemnification agreement. We note that the statute refers to the "sole negligence of the promisee or indemnitee, [or] his *agents*." (Emphasis added.) T-M, Oakland, and Owen were all agents of OCRC, and these are the only parties, plus OCRC, whose negligence or wrongdoing was at issue. So, in a sense, the indemnification agreement is a covenant to indemnify OCRC for liability arising out of damage to property caused by or resulting from the sole negligence of OCRC and its agents (T-M, Oakland, and Owen). However, because T-M also stood in the shoes of the indemnitor and was accused of negligence or wrongful conduct, the indemnification agreement could be enforced without offending MCL 691.991.

Finally, T-M argues that the doctrine of acquiescence precludes OCRC from being indemnified by T-M. OCRC argues that the doctrine of acquiescence does not apply in this case because there is no contractual provision limiting T-M's obligation to indemnify OCRC. T-M, citing law from other jurisdictions, asserts that the doctrine of acquiescence is applied to prevent indemnitees from recovering full indemnity where they have acquiesced in the condition giving rise to the underlying liability. *Illinois Central Gulf R Co v Crown Zellerbach*, 859 F2d 386, 390 (CA 5, 1988). T-M argues that OCRC acquiesced in blocking the culvert when it failed to timely respond to repeated notifications of the blocked culvert. OCRC notes that *Illinois Central* also indicated that the doctrine should only be employed to the extent that it is consistent with the express language and obvious purpose of the indemnification agreement.

Assuming that this doctrine is applicable in Michigan and in non-railroad cases (T-M only cites railroad cases), the record does not support a conclusion that OCRC acquiesced to having a blocked culvert, and it certainly did not acquiesce to the flooding of plaintiff's property. Instead, it simply failed to timely respond to notice that the culvert was blocked, and OCRC did eventually unplug the culvert, as did Oakland on occasion. There was neglect, but not acquiescence. Also, the property had already been flooded and damaged to some extent at the time of notification. Further, applying the doctrine of acquiescence would be inconsistent with the express language of the indemnification agreement.

Viewing the indemnification agreement in a light most favorable to T-M, the agreement clearly applied in this case and thus the trial court did not err in directing a verdict in favor of OCRC. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

2. T-M'S APPEAL OF THE NO-CAUSE VERDICT (GREAT WEIGHT)

T-M argues that the evidence established that Owen and Oakland were solely responsible for clogging the culvert and failing to remove the debris from the culvert. T-M points to evidence that Owen acknowledged that it was responsible for tree and stump removal and clearing, and that Oakland acknowledged that it was responsible for earthwork, grading, and culvert replacement. Indeed, there was evidence that Oakland personnel discovered on occasion that the culvert was blocked and a crew unplugged it. T-M further maintains that there was no evidence presented at trial that OCRC or T-M were at fault for blocking the culvert. Therefore, T-M contends that the no-cause verdict was against the great weight of the evidence.

First, we agree with Owen and Oakland that T-M failed to preserve the issue for appeal. "[C]hallenges to verdicts on the ground that they are against the great weight of the evidence, must be raised in a motion for a new trial in order to preserve them for appeal." *Heshelman v Lombardi*, 183 Mich App 72, 83; 454 NW2d 603 (1990); see also MCR 2.611(A)(1)(e). The no-cause judgment at issue was a separate judgment from the $2.2 million judgment entered in favor of plaintiff and it had nothing to do with the order rejecting plaintiff's request for case evaluation sanctions. The $2.2 million judgment and order denying sanctions formed Docket No. 291989. Therefore, the filing of the claim of appeal in Docket No. 291989 by plaintiff on May 6, 2009, did not preclude T-M from attacking the no-cause judgment through a motion for new trial, as this Court did not yet have jurisdiction over the no-cause judgment. See MCR 7.208(A) (after claim of appeal, the trial court may not set aside or amend the judgment "appealed from"). It was T-M's *own action* in filing the claim of appeal in Docket No. 292159 on May 15, 2009, relative to the no-cause judgment that effectively divested the trial court of jurisdiction to hear and decide a motion for new trial premised on a great-weight argument. T-M should have first filed its motion for new trial, obtained a ruling, and then filed its claim of appeal as to the no-cause judgment. T-M argues that this Court's order on the remand motions, which provided that the parties "failed to demonstrate that there is an issue sought to be reviewed on appeal that should be decided initially by the trial court," was an expression by this Court that it was unnecessary to preserve the great-weight argument below before we addressed the issue. *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished order of the Court of Appeals, entered June 25, 2009 (Docket Nos. 291989 and 292159). However, it was T-M's failure to adequately identify its great-weight argument in its motion to remand filed with this Court that accounted for the Court's wording of the order.

Furthermore, the issue is not adequately briefed. As to both subcontractors, the jury answered "no" to the verdict questions asking whether they had breached the subcontracts, whether they had been required to obtain liability insurance, whether they were required to contractually indemnify T-M, and whether they owed contribution to T-M. These questions correlated to the specific causes of action alleged in T-M's third-party complaint. While T-M argues that there was no evidence that it did anything to block the culvert and that the evidence showed that the subcontractors were to blame, T-M does not engage in any discussion whatsoever to connect the evidentiary matters to subcontracts, liability insurance, contractual indemnification, and contribution. Indeed, there is a complete absence of any discussion of contract, insurance, indemnification, and contribution law. T-M needed to discuss the evidentiary problems in relationship to, for example, the cause of action for breach of

subcontract – how does the fact that the subcontractors caused the culvert blockage equate to a breach of the subcontracts, what do the subcontracts even provide and require?

Moreover, T-M's argument substantively fails. In *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006), this Court, addressing a great-weight claim, stated:

> We review for an abuse of discretion a trial court's denial of a motion for new trial. When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, "even if it is arguably inconsistent, '[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" "'[E]very attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.'" [Citations omitted.]

Here, there is no basis to grant T-M a new trial on the theory that the verdict was against the great weight of the evidence. As indicated by Oakland and Owen, there was sufficient evidence from which the jury could have reasonably determined that OCRC and/or T-M were at fault for the culvert blockage and not the subcontractors. As discussed above, part of plaintiff's case was predicated on design and planning flaws and defects relative to the road project that made the culvert susceptible to being blocked by soils and sediments as caused by erosion. Owen and Oakland had nothing to do with the plans and designs; they merely carried out certain aspects of the project. Additionally, the jury could have solely faulted T-M and/or OCRC because of their oversight responsibilities and failure to timely unplug the blocked culvert after it was called to OCRC's attention. Finally, Owen correctly asserts that there was evidence that its work on the project near or around the culvert site was completed before the new culvert was put in and before any problems developed and that its work on the project had nothing to do with the blockage. In sum, T-M's great-weight argument fails on multiple levels.

C. DOCKET NO. 295968

T-M'S APPEAL OF ORDER AWARDING CASE EVALUATION SANCTIONS

T-M appeals the trial court's order awarding Oakland case evaluation sanctions. The case evaluation recommendation was for Oakland to pay T-M $45,000 on T-M's third-party complaint. Oakland accepted the evaluation before summary disposition was granted in favor of OCRC, with T-M formally rejecting the evaluation after entry of the summary disposition order. In simplest of terms, given the no-cause jury verdict, which was more favorable to Oakland than the case evaluation, along with T-M's *previous* rejection of the case evaluation, MCR 2.403(O)(1) and (4)(a) mandated the trial court to award sanctions to Oakland.

Many of T-M's arguments are comparable to those made by OCRC in relation to plaintiff's request for case evaluation sanctions. T-M contends that the case evaluation process became moot once the trial court entered the order granting OCRC's motion for summary

disposition. For all of the reasons discussed earlier in this opinion, these arguments necessarily fail. The case evaluation process did not become moot and the litigation was not at an end simply because summary disposition was granted, where plaintiff had the procedural opportunities to seek reconsideration and an appeal. In fact, T-M's arguments have even less merit than OCRC's arguments because the summary dismissal order pertained to plaintiff's suit against OCRC and not T-M's third-party action against Oakland, which remained pending. Although the trial court found the third-party claims to be moot after it granted OCRC's motion for summary disposition, that dismissal did not mean that T-M's third-party complaint against Oakland was dismissed, which complaint was based in part on breach of a subcontract as to the road project and the procurement of insurance. This fact was made quite evident and clear when this Court dismissed plaintiff's claim of appeal for lack of jurisdiction back in 2006 because the third-party claims had not been dismissed. *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished order of the Court of Appeals, entered July 17, 2006 (Docket No. 271438).

T-M argues that *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549; 640 NW2d 256 (2002), supports a conclusion that the summary dismissal of OCRC essentially ended the entire civil action and thus the case evaluation process terminated, as case evaluation is not a piecemeal process. Again, even if one accepted that summary dismissal of OCRC temporarily rendered irrelevant T-M's third-party complaint against Oakland, the summary dismissal itself did not render the case evaluation process meaningless because plaintiff had the right to seek reconsideration and an appeal. Further, reliance on *CAM Constr* is misplaced. The question there was "whether a party may appeal an adverse summary disposition judgment on one count of a multicount action after accepting a case evaluation rendered under MCR 2.403." *Id.* at 550. The Court held that under MCR 2.403(M)(1), which provides that a party's acceptance of a case evaluation disposes of all claims in the action, after acceptance of a case evaluation, "a party may not subsequently appeal an adverse summary disposition on one count in the action." *Id.* The *CAM* holding and analysis has absolutely no bearing on resolving the case evaluation issue in the instant case. We note that MCR 2.403(O)(4)(a) addresses "cases involving multiple parties" and provides that "in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties." Accordingly, the focus had to be on the evaluation and verdict as between T-M and Oakland, not the evaluation as between OCRC and plaintiff, and the no-cause verdict was more favorable to Oakland than the $45,000 evaluation, which T-M formally rejected and Oakland accepted.

Next, T-M argues that the case evaluation sanctions should not have been awarded because the case did not proceed to trial in the "normal fashion" under MCR 2.403. MCR 2.403(N)(1) provides that when "all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion." Subsection (N) discusses the nature of proceedings following a case evaluation rejection, focusing chiefly on circumstances where a case evaluation panel finds a claim or defense to be frivolous. Subsection (O) governs the liability for costs, and the "normal fashion" language in (N)(1) is entirely irrelevant for purposes of determining sanctions under subsection (O).

None of T-M's arguments are availing, and MCR 2.403(O) required the award of case evaluation sanctions in favor of Oakland.

III. CONCLUSION

In Docket No. 291989, we hold that the trial court erred in denying plaintiff's request for case evaluation sanctions. Further, again in Docket No. 291989, we reject in total OCRC's arguments that the inverse condemnation claim was not ripe for litigation, that there were instructional errors, that the elements of a taking were not established, that it could not be held liable for the negligence of the contractor and subcontractors, that there was prejudicial attorney misconduct, and that it was entitled to remittitur. In Docket No. 292159, we hold that the trial court did not err in directing a verdict against T-M and in favor of OCRC on the third-party indemnification complaint, and we further hold that the jury verdict in favor of the subcontractors Oakland and Owen was not against the great weight of the evidence. T-M's arguments with respect to the judgment against OCRC and in favor of plaintiff on the inverse condemnation claim, which mimic OCRC's arguments, also fail. Finally, in Docket No. 295968, we hold that the trial court did not err in awarding case evaluation sanctions in favor of Oakland and against T-M.

In sum, we affirm in all respects, except that we reverse and remand in regard to the trial court's order denying plaintiff's request for case evaluation sanctions against OCRC. We do not retain jurisdiction. In regard to the taxation of costs under MCR 7.219, plaintiff is entitled to costs as the prevailing party against OCRC, OCRC is entitled to costs as the prevailing party against T-M, and Oakland and Owen are entitled to costs as the prevailing parties against T-M.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly